TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 441

UNITED STATES MORTGAGE COMPANY AND THE MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS AND JOHN MATTHEWS.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

PETITION FOR CERTIORARI FILED OCTOBER 4, 1934.

CERTIORARI GRANTED NOVEMBER 5, 1934.

SUPREME COURT OF THE UNITED STATES

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MARY E. MATTHEWS AND JOHN MATTHEWS

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INDEX

	Original	Print
Record from Circuit Court No. 2 of Baltimore City	1	1
Caption (omitted in printing)	1	
Docket entries	3	1
Petition for decree	4	2
Exhibit No. 1—Mortgage by Walter H. Worner to Mortgage Guarantee Co.	5	3
Exhibit No. 2—Assignment of mortgage by Mortgage Guarantee Co. to Mary E. Matthews and John Matthews	11	8
Note re answer and demurrer thereto	13	10
Petition for leave to withdraw demurrer to answer, etc.	14	10
Order withdrawing demurrer and allowing amendment to petition	15	11
Amended petition	15	11
Exhibit "A"—Open letter from Mortgage Guarantee Co., February 14, 1933	22	18
Exhibit "B"—Plan of re-adjustment proposed by Mortgage Guarantee Co.	29	24
Demurrer to amended petition	34	29
Order overruling demurrer	35	30

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—5450-C

	Original	Print
Answer to amended petition	36	30
Statement of evidence	40	34
Caption	40	34
Testimony of C. Alex Fairbank, Jr.	40	35
Charles H. Buck	48	42
Clarence A. Tucker	53	47
Arthur A. Loth	66	59
J. Calvin Carney	70	63
Blanchard Randall, Jr.	73	65
Blanchard Randall, Jr., (recalled)	76	69
Colloquy re amendment to petition and demurrer thereto	87	80
Testimony of Blanchard Randall, Jr., (recalled)	89	81
Note re omission of certain exhibits	94	85
Plaintiffs' exhibit "A"—Assignment and agreement between Maryland Title Securities Corp. and The Equitable Trust Co., February 18, 1931	94	86
Plaintiffs' exhibit No. 2—Bill No. 68, Senate of Maryland	99	90
Defendants' exhibit "X"—List of certificates and assignments, etc.	104	94
Plaintiffs' exhibit No. 3—Schedule of certificates and assignments and outright mortgages	104	94
Plaintiffs' exhibit No. 4—Form of management agreement	105	95
Plaintiffs' exhibit No. 6—Form of first mortgage certificate	107	96A
Opinion, O'Dunne, J.	111	97
Decree	126	111
Order for appeal	127	113
Stipulation waiving bond, etc.	128	113
Order of transmittal	129	114
Clerk's certificate (omitted in printing)	130	
Proceedings in Court of Appeals of Maryland	131	115
Docket entries	131	115
Bill of costs (omitted in printing)	131	
Decree	132	115
Opinion, Digges, J.	133	116
Clerk's certificate (omitted in printing)	151	
Order allowing certiorari		128

[fols. 1 & 2] [Caption omitted]

[fol. 3]

IN CIRCUIT COURT No. 2 OF BALTIMORE CITY

No. 7101-C

J. Calvin Carney, Frederick H. Hennighausen } MARY E. MATTHEWS, JOHN MATTHEWS

Wm. L. Marbury, Jr., Knapp, Tucker & Thomas } WALTER H. WORNER, UNITED STATES MORTGAGE CO., and MORTGAGE GUARANTEE CO.

DOCKET ENTRIES

22 December, 1933.—Petition for the sale of Mortgaged premises (1) fd. Exhibit No. 1 (2) fd. (S. C. L. 4440-397), Exhibit No. 2 (3) fd. (S. C. L. 5347-518).

8 January, 1934.—The Petition of the United States Mortgage Company and the Mortgage Guarantee Co., for leave to intervene as defendants and to oppose granting of a decree as prayed in Petition &c. and Order of Court thereon granting the same (4) fd.

8 January, 1934.—Answer of United States Mortgage Co., and the Mortgage Guarantee Co., to the Petition of Plaintiffs (5) fd.

19 January, 1934.—Demurrer of Plaintiff to the Answer of United States Mortgage Company and Mortgage Guarantee Co. &c. (6) fd.

26 January, 1934.—Motion for Hearing (7) fd.

26 January, 1934.—Notice as to Hearing (8) fd. (Copies issued) (Served on J. Calvin Carney-Knapp, Tucker & Thomas, Solrs.)

13 March, 1934.—Summons issued for witness for Plaintiff (9) fd.

20 March, 1934.—Petition of Plaintiffs to amend Demurrer nunc pro tunc as of the date of the filing, so that same shall raise issue in fact as to "Emergency," and be known as the Answer and Demurrer of Plaintiff &c. and Order of Court thereon granting the same (10) fd.

20 March, 1934.—Motion Ne Recipiatur to amendment of demurrer raising issue of fact as to "Emergency" referred to in ch. 56 Act 1933 sustained for reason that testimony cannot be taken on issue of fact on a demurrer designed to raise only question of law. Order (11) fd.

21 March, 1934.—Petition of Plaintiffs for authority to withdraw Demurrer and file in place thereof an amendment [fol. 4] additional to the Petition filed December 22nd 1933 nunc pro tunc as of the filing thereof &c. and Order of Court thereon granting the same (12) fd.

21 March, 1934.—Amended Petition of Plaintiffs filed by leave of Court first had and obtained (13) fd.

21 March, 1934.—Demurrer of the United States Mortgage Co., and the Mortgage Guarantee Co., to the Amended Petition of Plaintiffs filed herein under leave of Court (14) fd.

21 March, 1934.—Order of Court overruling Demurrer with leave to the said intervening Respondents to file an Answer to the said amended Petition (15) fd.

21 March, 1934.—Answer of Intervening respondents United States Mortgage Co., and the Mortgage Guarantee Co. to amended petition of Mary E. Matthews, et al. (16) fd.

22 March, 1934.—Opinion of Court (17) fd.

22 March, 1934.—Decree (18) fd.

28 March, 1934.—Testimony and Exhibits Ptr. A, 2, 3, 4, 5 and 6 and Dft. Ex. X (19) fd.

28 March, 1934.—Order for appeal by United Mortgage Company and Mortgage Guarantee Company, intervening Respondents and each of them from Decree of March 22, 1934, and from Order of March 2, 1934 overruling intervening Respondents' demurrer to Petitioners' amended Petition (20) fd.

28 March, 1934.—Stipulation of counsel (21) fd.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

PETITION FOR DECREE—Filed December 22, 1933

To the Honorable the Judge of said Court:

The petition of the plaintiffs respectfully represent-:

That on the 30th day of July, A. D. 1925, the defendant executed and delivered to Mortgage Guarantee Company

a mortgage upon certain fee simple property in the City [fol. 5] of Baltimore, therein described, to secure the payment of the mortgage debt of $3,000 and interest as therein mentioned, wherein said mortgagor assented to the passage of a decree for the sale of said mortgaged property, to take place at any time after any default in any covenant or condition of said mortgage; all of which will appear from certified copy of said mortgage, marked "Petitioners' Exhibit No. 1," and filed herewith as part of this petition; your Petitioners are the record holders of an assignment of an undivided 500/2950 share, equivalent to Five hundred dollars ($500.00), in said mortgage; said assignment is filed as part of this petition, marked "Petitioners' Exhibit No. 2"; that said mortgage is in default in the covenants and conditions thereof in that the 1932 and 1933 taxes are due and unpaid and because payments on principal in accordance with the terms thereof have not been made.

And your petitioners pray that a decree may be passed for the sale of said property in accordance with the terms of said mortgage.

And as in duty, &c.

J. Calvin Carney, Frederick H. Hennighausen, Attorneys for Plaintiffs.

PETITIONERS' EXHIBIT No. 1.—Filed December 22, 1933, with Petition for Decree

Walter H. Worner—Mtge. to Mtge. Guarantee Co. of Del.

This mortgage made this 30th day of July in the year one thousand nine hundred and twenty-five by and between Walter H. Worner unmarried of Baltimore City State of Maryland, party of the first part mortgagor and Mortgage Guarantee Company a corporation of State of Delaware party of the second part mortgagee Whereas the said mort- [fol. 6] gagor is justly indebted unto the said mortgagee in the full sum of Three Thousand Dollars for money this day loaned and advanced to be applied in payment of the purchase money of the property hereinafter described which said sum the said mortgagor has covenanted and agreed to repay unto the said mortgagee three years from the date

hereof together with interest to accrue on said principal sum at the rate of six per centum per annum payable quarterly both principal and interest being payable in gold coin of the United States of the Present Standard of weight and fineness and Whereas it was a condition precedent to the making of the aforesaid loan that the repayment with interest should be secured by the execution of these presents Now therefore this mortgage witnesseth that in consideration of the premises and of the sum of one dollar this day paid the receipt whereof is hereby acknowledged the said mortgagor doth grant and convey unto the said mortgagee its successors and assigns in fee simple all that lot of ground situated in Baltimore City in the State of Maryland and described as follows that is to say Beginning for the same on the southernmost side of Patapsco Avenue at a point distant eighty-one feet six inches westerly from the westernmost side of Fairview Avenue which place of beginning is intended to be on a line drawn through the centre of the partition wall between the house erected on the lot now being described and the house erected on the lot adjoining thereto on the east running thence westerly binding on the southernmost side of Patapsco Avenue sixteen feet one and one half inches to intersect a line drawn through the centre of the partition wall between the house erected on the lot now being described and the house erected on the lot adjoining thereto on the west thence southerly binding on said line and to and through the centre of said last mentioned partition wall and continuing the same course in all seventy-five feet to the centre of an alley ten feet wide there situate thence running easterly binding on the centre of said alley with the use of same in common sixteen feet one and one half inches to intersect a line drawn through the centre of the partition wall first mentioned in this description and running thence northerly along said line and to and through the centre of said last mentioned wall seventy-five feet to [fol. 7] the place of beginning Being the premises known as No. 1339 Patapsco Avenue being the lot of ground sixthly described in a deed of even date herewith and recorded or intended to be recorded among the Land Records of Baltimore City prior hereto whereby said lot was granted and conveyed by Jasper D. Ogden and wife to the said mortgagor in fee simple together with the buildings

and improvements thereupon and the rights alleys ways waters privileges appurtenances and advantages thereto belonging or in anywise appertaining to have and to hold the said lot of land with the improvements and appurtenances aforesaid unto the said mortgagee its successors and assigns in fee simple provided that if the said principal sum of money loaned as aforesaid and the interest thereon shall be paid when due and if all of the covenants herein mentioned shall be performed then this mortgage shall be void but upon any default being made in the payment of the said principal or interest in whole or in part when due or upon any default being made in any covenant or condition of this mortgage then the whole mortgage debt hereby secured shall thereupon be deemed due and payable forthwith And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto And upon any default in the terms of this mortgage a sale may be made by the said mortgagee its successors or assigns or by its or their Attorney under Article LXVI Sections 6 to 10 inclusive of the Maryland Code of 1904 Public General Laws or any other general or local laws of the State of Maryland relating to mortgages And it is agreed that upon any sale of said property under this mortgage whether under the above assent to a decree or under the above power of sale the proceeds of sale shall be applied as follows to wit first to the payment of all expenses incident to said sale including a counsel fee of twenty-five dollars for conducting the proceedings if without contest but if legal services be rendered to the mortgagee or its assignee or to the trustee or [fol. 8] party selling under the power of sale in connection with any contested matter in the proceedings then such other counsel fees and expenses shall be allowed out of the proceeds of sale as the court may deem proper and also a commission to the party making said sale equal to the commission allowed trustees for making sales of property under decree of a Court of Equity in Maryland second to the payment of all claims of the mortgagee its successors or assigns hereunder whether the same shall have then

matured or not and third the balance if any to the said mortgagor his heirs executors administrators or assigns And it is covenanted that until default be made in any covenant or condition of this mortgage (but not thereafter) the said mortgagor his heirs successors or assigns shall have possession of the property upon paying in the meantime all taxes and assessments public dues and charges levied or assessed or to be levied or assessed on the mortgaged property and on the mortgage debt and interest which mortgage debt and interest assessments public dues and charges the said mortgagor covenants to pay when legally due and upon payment thereof to exhibit to the mortgagee the receipted bills thereof at the place of business of the mortgage or its agent and upon any default in any of the covenants of this mortgage the mortgagee shall be entitled without notice to the mortgagor to the immediate appointment of a receiver of said property without regard to the adequacy or inadequacy of the property as security for the mortgage debt and upon any such default whether or not a receiver be appointed the rents and profits of said property are hereby assigned to the mortgagee as additional security And the said mortgagor covenants to keep the improvements on the land insured against loss by fire in an insurance company or companies selected by and in an amount designated by the said mortgagee and to cause the policy or policies to be so framed or endorsed as in case of fire to inure to the benefit of the said mortgagee its successors or assigns to the extent of its lien or claim under this mortgage and to deliver the policy or policies to the mortgagee to be kept by the mortgagee And in the event of any loss by fire the insurance company or companies are hereby directed by the mortgagor to make pay- [fol. 9] ment for such loss to the mortgagee only and not to the mortgagor and mortgagee jointly such payment to the mortgagee shall be applied to the extinguishment of the principal interest and expenses secured by this mortgage whether them due or not but shall not exceed the amount payable under this mortgage And the said mortgagor covenants to warrant specially the said property and to execute such further assurances thereof as may be requisite Witness the hand and seal of the said mortgagor

State of Maryland, Baltimore City, to wit: I hereby certify that on this 30th day of July in the year one thousand

nine hundred and twenty-five before me the subscriber a Notary Public of the State of Maryland in and for the City aforesaid personally appeared Walter H. Worner the within named mortgagor and acknowledged the aforegoing mortgage to be his act. At the same time also appeared John H. Duncan Vice-President and Agent of the within named mortgagee and made oath in due form of law that the consideration set forth in said mortgage is true and bona fide as therein set forth and also made oath that he is agent of the mortgagee. In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

Homer M. Respess, Notary Public. (Notarial Seal.)

Recd. for record—recorded & exd. July 31st, 1925, at 2:22 o'clock P. M. Stephen C. Little, Clerk.

For value received Mortgage Guarantee Company hereby assigns the within mortgage unto George A. Buchheister, Carl A. Nitze and William Koch, Trustees in the case of George A. Buchheister et al. Trustees vs. Dora Koch et al. Circuit Court No. 2 of Baltimore City. Witness the corporate seal of said Company and the signature of its Vice President this 11th day of September 1925. Witness (Mortgage Guarantee Company) Mortgage Guarantee Company [fol. 10] O. O. Ellis (Corporate Seal 1906 Delaware) by Warren S. Seipp, president.

Recd. for record—recorded & exd. Sept. 11, 1925, at 12:20 o'clock P. M. Stephen C. Little, Clerk.

George A. Buchheister &c. Trs. Sht. Asst. to Mortgage Guarantee Co.

For value received we hereby assign the within mortgage unto the Mortgage Guarantee Company. Witness our hands and seals this 3rd day of August 1931.

George A. Buchheister (Seal), Carl A. Nitze (Seal), William Koch (Seal), Trustees in the Case of George A. Buchheister et al., Trustees, vs. Dora Koch et al.

Recd. for record—recorded & exd. Aug. 3, 1931, at 2:55 o'clock P. M. Stephen C. Little, Clerk.

I hereby certify that the foregoing is a true copy taken from Liber S. C. L. No. 4440 folio 397 &c. one of the Land Records of Baltimore City.

In testimony whereof I hereto set my — and affix the Seal of the Superior Court of Baltimore City on this 21st day of December, A. D. 1933.

(S.) Stephen C. Little, Clerk of the Superior Court of Baltimore City. (Seal.)

[fol. 11] Petitioners' Exhibit No. 2—Filed December 22, 1933, With Petition for Decree.

First Mortgage Assignment

This assignment of mortgage made this thirtieth day of July, in the year one thousand nine hundred and thirty-two by the Mortgage Guarantee Company, a corporation hereinafter called "Company" and Mary E. Matthews and John Matthews hereinafter termed "Purchaser."

Witnesseth: That in consideration of five hundred dollars the receipt whereof is hereby acknowledged, the Company hereby grants and assigns unto the said purchaser Mary E. Matthews for her life, with full power to sell, mortgage or release all interest and estate in the interest in the mortgage hereinafter referred to and hereby assigned, with the additional power to use and consume the proceeds, with remainder to John Matthews, his personal representatives and assigns an undivided 500/2950 share (equivalent to Five Hundred dollars) in a first mortgage and in the debt thereby secured, for $2,950.00 from Walter H. Worner (This mortgage was originally for $3,000) to the Mortgage Guarantee Company dated July 30, 1925, and recorded among the Land Records of Baltimore City in Liber S. C. L. No. 4440 Folio 397, etc., said share in said mortgage and debt being a one 500/2750 part of that portion of the total mortgage debt which by the terms of said mortgage as hereinafter referred to is payable on 30th day of July 1935. The said mortgage conveys the property briefly described as follows: Being the fee simple property known as No. 1339 Patapsco Avenue, as particularly described in the above mortgage.

The mortgage bears interest at the rate of 6 per centum per annum, payable in equal quarterly instalments and ma- [fol. 12] tures three years from date, but contains no provision for prepayment thereof. By agreement the time for the payment thereof has been extended as follows:

$100 due July 30th, 1933.
100 due July 30th, 1934.
2,750 due July 30th, 1935.

The undivided share in said mortgage, and the debt thereby secured, shall be held by the purchaser Mary E. Matthews for life, and with the powers as above set forth, with remainder to John Matthews, his personal representatives and assigns, in common with the owner or owners of the remaining portions of said mortgage, and the debt thereby secured, subject to the terms and provisions of said mortgage.

In testimony whereof the Mortgage Guarantee Company has caused its corporate seal, duly attested, to be hereunto affixed, and these presents to be signed in its corporate name by its President or Vice-President.

Mortgage Guarantee Company, by Olin O. Ellis, Vice-President. (Corporate Seal Guarantee Mortgage Company.)

Attest and test:

Alex Kinnaird, Secretary.

STATE OF MARYLAND,
City of Baltimore, set:

I hereby certify that on this thirtieth day of July in the year one thousand nine hundred and thirty-two, before me the subscriber, a notary public of the state of Maryland, [fol. 13] in and for Baltimore City aforesaid, personally appeared Olin O. Ellis, the vice president of the Mortgage Guarantee Company, and acknowledged the aforegoing assignment of mortgage to be the act and deed of the Mortgage Guarantee Company.

Witness my hand and notarial seal.

Charles O'D. Mackall, Notary Public. (Notary Public Seal.)

Mortgage No. 3825.
Assignment No. 43276.

Amount: $500.00.
Maturity: July 30th, 1935.

Assignment of Mortgage from Mortgage Guarantee Co. to Mary E. Matthews and John Matthews

NOTE RE ANSWER AND DEMURRER THERETO

Note.—Following the filing of the aforegoing Petition and Exhibits, United States Mortgage Company, the owner of the equity of redemption in the property described in the mortgage, and Mortgage Guarantee Company, the holder of record and/or duly authorized representative of approximately 83% of the unpaid mortgage debt secured by the said mortgage, intervening Respondents upon their application and under an order of Court, duly answered the said Petition, opposing the granting of the decree prayed for in the Petition and setting up the provisions of the Act of 1933, Chapter 56 passed at the extraordinary session in 1933 of the General Assembly of Maryland.
[fol. 14] To this Answer the Petitioner duly demurred, attacking the constitutionality of the Act in question, but subsequently asked leave to withdraw said demurrer, which was granted as appears below.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

PETITION FOR LEAVE TO WITHDRAW DEMURRER TO ANSWER, ETC.—Filed March 21(1934

To the Honorable the Judge of said Court:

The Petition of Mary E. Matthews and John Matthews respectfully shows:

1. That heretofore they filed their Demurrer to each and every part of the Answer of the United States Mortgage Company and the Mortgage Guarantee Company, to the Petition of the said Mary E. Matthews and John Matthews, praying a decree for the sale of the mortgaged premises herein.

2. That they desire to withdraw said Demurrer and file in place thereof an amendment additional to the petition

filed December 22, 1933 nunc protunc as of the date of the filing thereof.

Wherefore your Petitioners pray that this Court may pass a proper Order in the premises.

And as in duty bound, etc.

Frederick H. Hennighausen, J. C. Carney, Solicitors for Petitioners.

[fol. 15] In Circuit Court No. 2 of Baltimore City

Order Withdrawing Demurrer, etc.

On the aforegoing petition, it is this 21st day of March. 1934, by the Circuit Court No. 2 of Baltimore City, ordered as follows:

John Matthews heretofore filed is hereby withdrawn, and

That the Demurrer of the said Mary E. Matthews and the said Mary E. Matthews and John Matthews are hereby authorized to file an amendment nunc protunc as of the date of the filing of said petition filed December 22, 1933, said amended petition to be taken as part of and as an amendment and as addition to said petition.

That any of the parties to this case shall have the right to take testimony in open Court with respect to the issues of fact presented by said amendment.

Eugene O'Dunne.

In Circuit Court No. 2 of Baltimore City

Amended Petition—Filed March 21, 1934

Amended Petition of Mary E. Matthews and John Matthews Filed by Leave of Court First Had and Obtained

To the Honorable the Judge of Said Court:

The Petition of Mary E. Matthews and John Matthews, respectfully represents:

1. That your Petitioners are the holders of an assignment of an undivided interest in the mortgage herein filed, secured by property in the City of Baltimore, known as No.

1339 Patapsco Avenue, the balance on said mortgage being Twenty-nine hundred and fifty dollars ($2,950.00) on the principal thereof; Your Respondents owning a Five hundred dollar interest or share in said mortgage, all of which is more fully set out in the Petition for Foreclosure and the Exhibits therewith heretofore filed, and to which reference is made.

[fol. 16] 2. That after the assignment to Your Petitioners of said share in said mortgage aforesaid, the said Mortgage Guarantee Company became involved in financial difficulties and thereupon, on February 14th, 1933, sent to the holders of guaranteed first mortgage certificates an open letter, copy of which is hereto attached and marked Petitioners' Exhibit A, and prayed to be taken as part hereof; with said letter was a plan of re-adjustment proposed by the Mortgage Guarantee Company, copy of which is attached hereto marked Petitioners' Exhibit B, and prayed to be taken as part hereof; paragraph 2, sub-paragraph b, of said plan of re-adjustment is as follows:

"In lieu of the one-half of one percent (½ of 1%) out of interest payments now retained by the Company for services which the Company performs in the collection of principal and interest on the mortgages guaranteed to it, the Company shall be entitled to retain out of interest so collected by it an additional one per cent (1%) or a total of one and one-half percent (1½%) per annum, provided, however, that in no event shall the holders receive interest at the rate of less than four and one-half per cent (4½%) per annum, accounting from the last previous interest payment date. Payment of the next installment of interest shall be at the reduced rate of four and one-half per cent (4½%) per annum."

Your Petitioners, on receipt of said letter, refused to consent to said plan of re-adjustment and, accordingly, refused to execute the necessary papers submitted to them by the said Mortgage Guarantee Company; that Your Petitioners refused to consent to said plan because under the terms thereof Your Petitioners would agree not only to extend the time for repayment of the mortgage debt in which they had been assigned an interest, but would also agree to pay to the Mortgage Guarantee Company an additional sum

of one per cent of the interest due on said mortgage and collected by the Mortgage Guarantee Company, and which one per cent was to be used not only for the expense of collection but was to become part of a fund to be used to make good anticipated losses on other mortgage debts, the [fol. 17] payment of which is guaranteed by the said Mortgage Guarantee Company; in effect forcing Your Petitioners to use their monies to make good, in whole or in part, losses expected to be made on other mortgages in which Your Petitioners have no interest or estate; and that said one per cent was also to be used to pay the salaries and expenses of the said Mortgage Guarantee Company and for its operations of other properties, in which Your Petitioners had no interest or estate.

3. Your Petitioners further show that at the time of the assignment to them of said share in said mortgage that the said mortgage was in default in the terms and conditions thereof, which fact was known to the assignor, the Mortgage Guarantee Company, by reason of the fact that the taxes due and payable on said property had not been paid.

4. That in the fall of 1933 several holders of interests in mortgages, who held interests by virtue of assignments similar to those held by Your Petitioners instituted foreclosure proceedings under the assent to the decree contained in the mortgages made to the Mortgage Guarantee Company, default having occurred in the covenants and conditions of the mortgage; that thereupon the said Mortgage Guarantee Company instituted foreclosure proceedings in many cases wherein it, the said Mortgage Guarantee Company, had executed assignments of mortgages to various holders thereof, and the said Mortgage Guarantee Company, by virtue of the powers conferred upon it by those persons assenting to the plan of readjustment hereinbefore referred to, filed said proceedings for the foreclosure of said mortgages and had its appointees made trustees in said cases; that Your Petitioners aver and declare that the actions of the said Mortgage Guarante Company in said cases were for the sole purpose of preventing any holders of fractional interests in said mortgage from exercising their rights to secure such decree for the sale of said mortgaged premises; Your Petitioners further allege that the trustees appointed by the decrees in said cases have no intention of making any sale

of the property at the present time, although said mort-
[fol. 18] gages are in default and that their only reason for obtaining said decrees was to prevent the minority interests from exercising their legal rights to obtain a decree for the sale of said premises and to make sale thereof, in accordance with the terms and conditions of the mortgages.

5. Your Petitioners are informed by the officials of the Mortgage Guarantee Company that approximately ninety-three per cent of the holders of assignments of mortgages have agreed to said re-organization plan and have assented thereto, and that therefore the said Mortgage Guarantee Company, because of its control, and by virtue of the power vested in it by said re-organization agreement, has control of the majority interests in all of said mortgages, and that the obtaining of the decrees and the refusal of the said trustees to sell was an attempt on the part of the Mortgage Guarantee Company to force the non-assenting assignees to agree to the terms of the said re-organization agreement; that at the extra-ordinary session of the General Assembly of Maryland, from November 23, 1933 to December 11th, 1933 the Mortgage Guarantee Company, its attorneys, officers and agents, introduced a Bill entitled Chapter 56, which was passed by the said General Assembly; that said act was passed solely for the benefit of said Mortgage Guarantee Company and the persons represented by it, and was passed to prevent the holders of minority interests in a mortgage, similar to those held by Your Petitioners, from exercising their legal right to foreclose the mortgage under the assent to a decree, although this right to so foreclose is by said act reserved for the use of the Mortgage Guarantee Company, which owns or represents the holders of majority interests in said mortgage, and that the said act was passed for the purpose of forcing Your Petitioners and others who have not agreed, to agree to said plan of re-organization.

6. That the Saratoga Building and Land Company, a wholly owned subsidiary of the Mortgage Guarantee Company, has had control and managed said property No. 1339 Patapsco Avenue (the property given as security for the mortgage of which Your Petitioners own a share) since June 1932, together with twenty other properties in the
[fol. 19] same locality; that the records of the said Sara-

toga Building and Land Company disclose that since taking possession and management of said property, the said Saratoga — and Land Company has collected the amount of Sixty dollars in rent, and has expended Three hundred and seventy dollars and thirty-seven cents ($370.37) in repairs and other expenses, leaving a net deficit of Three hundred and ten dollars and sixty-three cents ($310.63); that the records of said Saratoga Building and Land Company, a wholly owned subsidiary of the Mortgage Guarantee Company, further disclose that no accurate account has been kept of the actual expenses incurred on said specific property, which is security for the mortgage in which Your Petitioners own a share, but that the expenses for the entire twenty-one properties were divided into twenty-one parts, and this arbitrary assessment was made against each property.

7. That Chapter 56 of the Acts of 1933 of the General Assembly of Maryland, passed at the recent Special Session of the Legislature of this State, and approved December 15th, 1933, is unconstitutional, is in conflict with and contrary to Section 10 of Article I of the Constitution of the United States reading as follows: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility."

8. That said Act of the Legislature is in conflict with and contrary to Section I, Article 14 of the "Articles in Addition to and Amendments of the Constitution of the United States of America," proposed by Congress and ratified by the Several States reading as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

[fol. 20] 9. That said Act of the Legislature is in conflict with and contrary to Article 23 of the Declaration of Rights of the State of Maryland, reading as follows: "That no man ought to be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the Land."

10. That said Act of the Legislature is in conflict with and contrary to Article 19 of the Declaration of Rights of the State of Maryland, reading as follows: "that every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the Land, and ought to have justice and right fairly without any denial, and speedily without delay, according to the Law of the Land."

11. That said Act is in conflict with and contrary to Article 44 of the Declaration of Rights of the State of Maryland, reading as follows: "That the provisions of the Constitution of the United States and of this State, apply as well in time of war as in time of peace; and any departure therefrom, or violation thereof, under a plea of necessity, or any other plea, is subversive of good Government and tends to anarchism and despotism."

12. That Chapter 56 of the Acts of the General Assembly, Session 1933, sets forth as a matter of legislative determination the prolonged business depression and the abnormal deflation of real and leasehold property values in Baltimore City, and further sets forth as a matter of legislative determination that any precipitate foreclosures would seriously effect the investment in said mortgages; Your Respondents deny that said Chapter 56 was passed for the purpose of protecting public interests against loss because of the alleged business depression, but asserts that said act in reality and effect was prepared and introduced by the General Assembly at the instance of the Mortgage Guarantee Company, its attorneys, officers and agents, solely for the benefit of said company and persons represented by it; Your Petitioners further allege and aver that at the said extraordinary session of the General Assembly of Maryland, being the session at which Chapter 56 was submitted and passed, there was submitted to said

[fol. 21] legislature an Act seeking to establish a general moratorium on all mortgage foreclosures for the same period of time as covered by said Chapter 56, viz: June 1st, *1935*, but that said Act failed to pass, so that it clearly appears that Chapter 56 of said Session of 1933 is not and was not intended to be in any sense or in any respect a moratorium on mortgage foreclosures, particularly inasmuch as even by the terms of said Act the right to a decree is not withheld from persons holding more than a twenty-five per cent interest in any mortgage.

13. Your Petitioners further allege and aver that the said legislation constitutes legislation for a particular company and/for the individuals represented by it, and has no part or relation to the general public welfare or good, and is an Act solely for the benefit of priviate individuals or persons, or other private interest unaffected by any public interest, in that the said Mortgage Guarantee Company, its subsidiaries and affiliated companies, owns or has control of the equity of redemption in approximately sixty per cent of the properties given as security for mortgages made to the Mortgage Guarantee Company, and in which mortgages on Maryland property fractional interest were assigned by said Mortgage Guarantee Company; that the said Mortgage Guarantee Company is practically the only company or individual which is or has been engaged in selling fractional interests in mortgages whereunder the said assignees had the legal right to institute foreclosure proceedings under the assent to a decree in the mortgage so made to the Mortgage Guarantee Company, so that it is evident that said Act was solely for the purpose and with the effect of enabling said Mortgage Guarantee Company, through its control of more than seventy-five per cent of the interests in the mortgages, to effectively dominate and dictate when and how the mortgages should be foreclosed under the assent to the decree, irrespective of the rights and desires of the holders of interests in said mortgages amounting to less than twenty-five per cent.

14. Your Petitioners further allege and aver that because the mortgages or the part of mortgages assigned by the Mortgage Guarantee Company are guaranteed by the Mortgage Guarantee Company as to the payment of prin-

[fol. 22] cipal and interest, and in the performance of the covenants and conditions of the mortgage, that said Act is designed for the purpose and with the effect of preventing the accrual of liabiiity under said guarantee by the said Mortgage Guarantee Company, and is designed for the purpose and effect of preventing those holders of interests in mortgages of said Mortgage Guarantee Company, who have not assented to and become parties of said reorganization plan, from asserting against said Mortgage Guarantee Company their rights under said guarantee.

And as in duty bound, etc.

Frederick H. Hennighausen, J. Calvin Carney,
Solicitors for Petitioners.

Petitioners' Exhibit "A"—Filed With Amended Petition

Mortgage Guarantee Company, 28 E. Fayette Street, Corner St. Paul, Telephone, Plaza 1690, Baltimore, Maryland

February 14, 1933.

An Open Letter

To All Holders of Our 5½% Guaranteed First Mortgages and Guaranteed First Mortgage Certificates:

This is a highly important letter. Your prompt action is required in a matter that affects your own welfare. It is lengthy, but please give it careful attention. Read it thoroughly, before you concern yourself with the other papers that accompany it.

[fol. 23] The General Condition of Real Estate

The depression is now entering its fourth year. From the strongest nations down to the most obscure individual —all have been affected. Like everything else, real estate values have been seriousy affected. Thousands of worthy property owners, all over the country, who have obtained mortgage loans, find themselves unable to repay these loans under present conditions. Through many causes—unemployment, wage cuts, business and security losses, and high taxes—the rental income from property has decreased sharply, and despite lower operating and mainte-

nance costs, the net income of mortgaged properties is in many cases not sufficient to cover taxes, interest at present rates and operating expenses; and, in addition, to pay anything on account of principal. This, in a broad sense is the situation that confronts every mortgage company and mortgagee in the country. Two alternatives are open to them under these circumstances:

The First, is the ruthless policy of foreclosing every mortgage in default. The disadvantages of such a policy are three-fold:

a) It is impossible to sell real estate today at any reasonable price.

b) It would mean a severe loss to all concerned. It would also do a great injustice to many worthy people already suffering from the depression.

c) It would add calamity to an already acutely abnormal condition.

The Second alternative is to adopt a constructive policy of cooperation with the property owners to work out with them each individual mortgage problem. The advantage of this alternative lies in the fact that the owners of the properties, with the assistance and supervision of the mortgage company, are usually the best qualified persons to produce favorable results from each particular property.

General Relief Measures

The Federal Government and various State Governments have taken notice of this acute situation. They sug- [fol. 24] gest that the mortgages of responsible owners, who may be in temporary financial difficulty, be not foreclosed—but be extended for a reasonable period, so that these owners can refinance under more favorable conditions than now exist. Some states are even formulating laws to forbid such foreclosures.

Developments in this direction have been rapid. President-elect Roosevelt has called a meeting for March 6th of the Governors of forty-eight states to consider, among other relief measures, the plight of the deserving property owner with mortgage obligations.

The Chicago Joint Stock Land Bank announced that it would cancel the interest on some of its mortgages for two years. Several large life insurance companies have an-

nounced that they would not institute further foreclosures on certain of their mortgages.

How Mortgage Companies Are Meeting the Situation

The Conveyancers Title Insurance & Mortgage Company of Boston, an old New England mortgage company, asked its investors to extend their mortgages for five years, and to accept a reduction of 1% in the interest rate (from 5½% to 4½%).

The New York Title & Mortgage Company on February 3 asked the holders of $27,000,000 of its Guaranteed First Mortgage Certificates to extend the maturities of these mortgages, and accept a reduction in the rate of interest from 5½% to 4%.

The Lawyers Westchester Mortgage Company, of New York State, has asked the holders of its mortgages to accept a reduction in interest rate from 5½% to 3%.

Current press dispatches indicate that the large New York mortgage companies will ask their investors in $3,000,000,000 of Guaranteed First Mortgages to also agree to accept extensions and a reduction of interest, and do their part in relieving the nation-wide distress.

This briefly cites some of the measures taken to cope with this difficult situation—measures designed to avert disaster for both property owners and investors.

[fol. 25] Problem and Plan of Mortgage Guarantee Company

The Mortgage Guarantee Company is naturally likewise affected by these general conditions, which are beyond its control. During the past three years this Company has advanced out of its own resources over $1,000,000 in principal and interest payments, and to otherwise protect the best interests of its investors, when property owners were unable to meet their obligations. To continue such a course means disaster. Receivership would mean a long, expensive process of liquidation and probable loss of both interest and principal to many investors.

The officers and directors of this Company have therefore, after careful consideration, formulated a Plan to attempt to avert such a disaster. Under this Plan the Company will dedicate its entire energies and conserve all its remaining resources for the benefit of all its investors.

This Plan is modeled after that of the mortgage company in Boston referred to above, which was accepted by 98% of its investors.

The Plan Has Three Main Features

1. The first main feature: We ask our investors to give us the right to extend their mortgages for a period not exceeding five years from the present maturity dates. This does not mean that you must sacrifice any of your present security—you merely allow us to postpone the final date on which the owner of the property is required to pay off his mortgage. Some mortgages, probably many, will not require such extension—they will be paid when due. The Plan give- the Company the privilege to make such maturity extension where the owner is capable, responsible and worthy—but is unable to meet his obligations under present depression conditions.

2. The second main feature of the Plan is the reduction of the interest rate by 1%—from 5½% to 4½%. In asking you to accept a reduction of only 1%, we are but adjusting the interest rate to present conditions. During the past two years savings bank interest has been decreased from 4½%, 4¼%, or 4% to the present rate of 3%. Probably [fol. 26] your interest return from many other securities has been reduced much more than this—or perhaps entirely eliminated. Also, consider that the decreased cost of living more than makes up for this slight reduction in interest return.

This 1% must be available for the payment of taxes on properties that may have to be taken over, keeping them in condition so that their value is not impaired, and to maintain the operation of this Company which under the Plan will be deprived of much of its usual income.

3. The third main feature of the Plan is the right to postpone interest due under the mortgage for a period of not longer than one year, where necessary and advisable. This provision is designed to help the worthy property owner "get on his feet" instead of ruthlessly foreclosing on him—especially where the property owner is best qualified to operate the property. This is merely a postponement—not a loss of interest to the investor; and not all interest will

be postponed, only that which is not paid when due, and then only until collected.

Plan Interpreted

This in brief, is a simple, clear explanation of our Plan for your protection. It must be presented for your acceptance in proper legal form to afford necessary protection both to Investor and Company. But such legal forms are not always clear to the average person. Therefore, below, we briefly interpret each numbered section of the Plan which accompanies this letter.

Section 1 gives the Mortgage Guarantee Company the right to extend where necessary and advisable, the maturity of any of its mortgages up to five years, and to reduce, only where necessary, the rate of interest payable by the property owner to the Company of 4½%. It also contains certain reasonable provisions and safeguards regarding possible foreclosures and the acquisition and reconditioning of foreclosed property for your protection.

Section 2 gives the Company the same five-year period of grace in its guarantee to its investors, that the Com- [fol. 27] pany extends where necessary to property owners as stated in the preceding paragraph. This also provides in all cases for a reduction in the interest rate (from 5½% to 4½%) that the Company will pay to its investors accounting from the last interest paying period of each mortgage. It further gives the Company the right to defer interest payments for one year on any particular mortgage where the owner is in default of such payments.

Section 3 provides that any investor holding an entire mortgage, or all investors in any particular mortgage, have the right at any time to withdraw such mortgage or mortgages from this Plan, provided they cancel the Company's guarantee of principal and interest, and reimburse the Company for any advances made on account of such mortgages. Then the responsibility for collection of the full mortgage interest and principal when due—as well as payment of taxes, insurance, etc., is entirely in the investors' hands.

Section 4 prohibits the Company from paying any dividend on its stock until this Plan shall be terminated.

Section 5 gives the Company the right to terminate the Plan at any time, provided that assenting Holders of all

extended mortgage obligations, still outstanding under this Plan, are paid in full as to principal, and as to interest at 4½% per annum to date of termination of Plan. On any mortgages that may not have then matured, interest will accrue from that date at the rate of 5½% per annum.

Section 6 provides that this safeguarding Plan will be put into effect only if holders of 90% in amount of outstanding mortgages and certificates give their assent.

Section 7 provides that the mailing of the accompanying Plan is considered due notice of the presentation of it to all investors.

Section 8 is a strictly legal provision which makes the printed Plan and your signed assent to it a formal agreement when the Plan becomes effective.

[fol. 28] Your Prompt Action is Requested

We have endeavored to make our statements to you as concise and clear as possible. The present economic situation, over which we have no control is an intolerable one for the Company. This Plan is a seriously contemplated step to forestall disaster—to safeguard the best interests of our investors, and the Company. Like many other large mortgage companies that are facing similar difficulties, we have determined to take this constructive step. We have every reason to believe that this move, if immediately adopted, will safely preserve your investments and permit the Company to continue to operate: But we cannot act until you authorize us to do so.

If there is any feature of this Plan which you do not fully understand, telephone or write us, and we will gladly call or write and answer your questions. If the Plan is clear to you, we are quite sure you will see the wisdom of giving your prompt assent to this sound and constructive move which should accomplish three beneficial things:

1. Strengthen and preserve your own investments;

2. Give needed relief to worthy property owners;

3. Strengthen the position and guarantee of this Company, which is the best way to make the other two considerations possible.

We earnestly urge you to immediately sign the enclosed assent form; have it properly witnessed and return it to

us promptly in the enclosed envelope which requires no postage.

Respectfully, Albert H. Dudley, President.

[fol. 29] PETITIONERS' EXHIBIT B—Filed With Amended Petition

Plan of Re-adjustment Proposed by Mortgage Guarantee Company, 28 E. Fayette St., Baltimore, Md., Dated February 14, 1933

Mortgage Guarantee Company, (herein called "Company") proposes to the Holders of the first mortgages guaranteed by it the Plan of Re-adjustment set forth below (herein called "Plan"), on the condition that the Plan is declared operative as herein provided. If and when such Plan is declared operative, then in consideration of the mutual promises of the Holders assenting to the Plan and of the promises of the Company, the parties hereto agree each with the other as follows:

The Plan

1. The Company, for the benefit of the Holders assenting to the Plan, shall be vested with the sole and entire control of the respective mortgaged premises, as if the Company were the mortgagee of each of such mortgages. In order to effect such control the Company shall have, in its absolute discretion, among other rights, the following rights:

(a) to extend at any time, or from time to time, the maturity of any mortgage, including amortization maturities, but not beyond the duration of the period of grace granted the Company under its guarantee of such mortgage, as hereinafter provided for;

(b) to reduce the rate of interest payable by the mortgagor of any of the mortgages, but not to a rate of less than four and one-half per cent (4½%) per annum;

(c) to foreclose any particular mortgage and (in its discretion) to purchase at the foreclosure sale either in [fol. 30] the Company's own name or in the name of a

wholly owned subsidiary of the Company, the property covered by such mortgage, or to otherwise acquire the property covered by a particular mortgage, and to manage the property so acquired and hold it in trust for the benefit of the Holders of the particular mortgage in lieu of the mortgage itself; and when the Company has so acquired such property, to pay, by way of advance, fire insurance premiums, taxes and other public charges, and to expand on such property such sums of money as the Company may in its sole discretion deem proper to recondition the property or to alter the structures on the same; upon the understanding that out of the first proceeds received from the sale or other disposition of the property the Company shall be reimbursed for the monies so advanced by it, together with interest thereon at four and one-half per cent (4½%) per annum. It is expressly understood and agreed that the Company shall look solely to the property for reimbursement, and shall have no right whatsoever against the Holder for whom the property is held in trust, as aforesaid.

(d) In the case the Company determines to foreclose any mortgage not then standing in the Company's name, the Holder or Holders of such mortgage will at that time, upon the Company's request, assign such mortgage to the Company for the purpose of foreclosure, as provided under sub-paragraph (c) of this section 1, and will accept from the Company its receipt for the same to be held in lieu of the mortgage.

(e) In case the property foreclosed is not purchased by the Company or its subsidiary under Sub-Section (c), but is sold to an outside purchaser, the net proceeds from such sale shall be ratably distributed as soon as legally possible among the Holders of the particular mortgage foreclosed and the Company shall remain liable to the Holders of such mortgage for any deficiency that may then remain, and shall have a maximum of five years thereafter in which to pay said deficiency, and shall pay interest thereon in the meantime at the rate of four and one-half per cent (4½%) per annum payable semi-annually. If the Company receives in lieu of cash a new mortgage or other property as part or all of the purchase price for property so sold, it [fol. 31] shall hold such new mortgage or other property in trust for the benefit of the holders of the particular mort-

gage foreclosed in the same manner and subject to the same conditions as above set forth in Sub-Section (c).

2. In order to assure, so far as is possible, the Company being maintained in a position to carry out the provisions of Section 1 hereof for the preservation of the mortgaged premises and the ratable distribution to the Holders of a particular mortgage of the proceeds derived from the premises covered by such mortgage, and to give, so far as is possible, financial substance to the Company's guarantee of mortgages, where it may be necessary for the Holders to rely on such guarantee, the Holders agree that the guarantee of the Company shall be modified as follows, namely:

(a) The Company in responding to its guarantee of the payment of principal, including amortization payments, on any particular mortgage, shall be entitled to a period of grace of five (5) years calculated from the maturity of the principal or amortization payment of such mortgage; except that, if and when payments of principal on a particular mortgage are received by the Company the Company shall remit such payments to the Holder or Holders of such mortgage entitled thereto, as specified in the mortgage.

(b) In lieu of the one-half of one per cent (½ of 1%) out of interest payments now retained by the Company for services which the Company performs in the collection of principal and interest on the mortgages guaranteed by it, the Company shall be entitled to retain out of interest so collected by it an additional one per cent (1%) or a total of one and one-half per cent (1½%) per annum, provided, however, that in no event shall the Holders receive interest at the rate of less than four and one-half per cent (4½%) per annum, accounting from the last previous interest payment date. Payment of the next installment of interest shall be at the reduced rate of four and one-half per cent (4½%) per annum.

(c) The Company in responding to its guarantee of the payment of interest on any particular mortgage shall be [fol. 32] entitled to postpone the payment of interest for a period of one (1) year from the date when such interest was due and payable; except that, if and when payments of interest on a particular mortgage are received by the Company, the Company shall, out of such payments, re-

mit not more than four and one-half per cent (4½%) per annum to the Holder or Holders of such mortgage entitled thereto, as specified in the mortgage.

3. In lieu of Section 2 hereof and as an alternative thereto, the Company offers to all assenting Holders at any time upon request to surrender its right to collect the principal and interest on any particular mortgage guaranteed by it (and which has not been previously foreclosed), upon reimbursement to the Company for any advances which the Company may have made to the Holder or Holders of such mortgage, provided that the Holder of such mortgage, if an entire mortgage, or the Holders of all the certificates, where the mortgage is divided into portions, cancel the entire liability of the Company under its guarantee of the mortgage.

4. The Company agrees with every Holder assenting to the Plan that no dividends shall be declared or paid upon the Company's capital stock until all of such Holders assenting to the Plan shall have been paid in full as provided hereunder, or the Company's obligations under its guarantee shall have been cancelled as hereinabove provided; or unless this Plan shall have been terminated as provided in Section 5 hereof.

5. The Company may at any time at its election terminate the Plan, provided that prior thereto the Company (a) has paid (or set apart for payment) to the Holders who have assented to this Plan, the principal, including amortization payments, in full on all then outstanding mortgages and certificates which would therefore have matured, except for this Plan, and (b) has paid (or set apart for payment) to the Holders who have assented to this Plan all interest theretofore due and unpaid on then outstanding mortgages and certificates, interest to be at the rate of four and one-half per cent (4½%) per annum, accounting from the last previous interest payment date prior to the date that this Plan is declared operative to the date of the termination of this Plan.

[fol. 33] Upon the termination of the Plan as aforesaid, the Company agrees to pay in full the principal, including amortization payments, as and when the same shall become due, on all then outstanding unmatured mortgages and certificates. Also the Company agrees to pay interest

on such mortgages, as and when the same shall become due, at the rate of five and one-half per cent (5½%), from the date of the termination of this Plan to the date of the maturity of the principal or amortization payments as specified in the mortgages. The intent and meaning of this provision and Plan being that from and after the termination of the Plan the Holders of mortgages and certificates, respectively, who have assented to the Plan shall thereafter have the same rights and privileges to which they would have been entitled had this Plan not been adopted.

6. The Plan embodied in this agrement shall become operative, only provided (a) that the Holders of ninety per cent (90%) in amount of the aggregate outstanding mortgages, trusts and certificates assent in writing thereto, or in accordance with the provisions of Section 3 hereof, surrender for cancellation the Company's guarantee within, two months of the date hereof, except, however, that the Company shall have the right, at any time prior to the expiration of said period of two months, to extend the same for a further period of one month, upon giving notice thereof to the Holders who have assented to the Plan; and further (b) only upon the Board of Directors of the Company, in its absolute discretion, by resolution, declaring the Plan operative, and the Company giving notice thereof to the Holders who have assented to the Plan; it being expressly understood that the Board of Directors shall have the absolute right, at any time prior to declaring the Plan operative, to abandon the same by giving notice of such abandonment to the Holders who have assented to the Plan. The Holders assenting to the Plan agree with the Company and with one another that their assent thereto shall be irrevocable until either the Plan shall be declared to be abandoned, as herein provided, or the period of time for assenting to the Plan, as herein provided, shall have expired without the adoption or abandonment of the same.

[fol. 34] Notice, as used herein with respect to the Holders who have assented to the Plan, shall be deemed to have been complied with if such notice be in writing and mailed or delivered to such Holders at their addresses as the same appear upon the books of the Company. Notice to the

Company shall be sufficient if in writing and mailed or delivered to Mortgage Guarantee Company, Baltimore, Maryland.

8. If this Plan be declared operative, as herein provided, then and thereupon this proposal and the written assents thereto shall constitute the agreement, which agreement may be executed in any number of counterparts, all of which shall be deemed an original, and such counterparts shall constittue but one and the same instrument, which shall for all purposes be sufficiently evidenced by any such original counterpart.

For the Board of Directors. Albert H. Dudley, President.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

DEMURRER TO AMENDED PETITION—Filed March 21, 1933

To the Honorable the Judge of said Court:

The intervening defendants, the United States Mortgage Company and the Mortgage Guarantee Company, demur to the amended petition of Mary E. Matthews and John Matthews, filed herein under leave of Court, and to each and every paragraph thereof, and cause of demurrer show:

(1) That the said amended petition shows on the face thereof that this Court is without jurisdiction to grant the relief therein prayed.

(2) That there is no sufficient allegation of any fact well pleaded in said amended petition to show any jurisdiction of the Court to grant the relief therein prayed.

[fol. 35] (3) That there is no sufficient averment of such interest of the said Mary E. Matthews and John Matthews in the subject-matter of the petition to entitle them to the relief therein prayed, or any relief in the premises.

(4) That it appears upon the face of said amended petition that the petitioners have less than a 25% interest in the mortgage and mortgage indebtedness secured thereby, and there is no allegation or averment that said amended petition is filed by or with the consent or concurrence of

25% or more of the holders of record of the mortgage or mortgage debt.

(5) That there is a total want of equity in the said amended petition.

And as in duty bound, etc.

Knapp, Tucker & Thomas, Solicitors for United States Mortgage Co. and Mortgage Guarantee Co., Intervening Defendants.

(Affidavit annexed.)

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

ORDER OVERRULING DEMURRER—Filed March 21, 1934

The Demurrer of the Intervening Respondents, United States Mortgage Company and Mortgage Guarantee Company to the amended Petition of Mary E. Matthews and John Matthews, filed herein, coming on for hearing, the parties interested through their respective counsel, were heard.

It is, thereupon, this 21st day of March, 1934, by the Circuit Court No. 2 of Baltimore City, Ordered and Decreed, that the said Demurrer be and the same is hereby overruled with leave to the said intervening Respondents to file an Answer to the said amended Petition.

Eugene O'Dunne, Judge.

[fol. 36] IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

ANSWER TO AMENDED PETITION—Filed March 21, 1934

To the Honorable the Judge of said Court:

The Answer of the intervening respondents, the United States Mortgage Company and the Mortgage Guarantee Company, to the Amended Petition of Mary E. Matthews and John Matthews:

The aforesaid intervening respondents answering said amended petition, say:

1. Answering the first paragraph of said petition these respondents admit the matters and facts therein alleged.

2. Answering the second paragraph of said amended petition, these respondents admit sending out a letter under date of February 14, 1933, with a Plan of Re-adjustment attached thereto, a copy of which purports to be filed with said amended petition as "Petitioners' Exhibit B." and that petitioners refused to consent to said plan. The remaining allegations of said paragraph consist merely of averments of the conclusions of the pleader which these respondents are not called upon either to admit or deny.

3. Answering the third paragraph of the amended petition, these respondents say that the allegations therein made are immaterial and irrelevant to any relief prayed, and these respondents are not called upon either to admit or deny the same.

4. Answering the fourth paragraph of said amended petition, these respondents admit the allegations of fact contained therein, but these respondents specifically deny the opinions expressed in said paragraph as to the intention of the trustees appointed by the decrees referred to therein and as to the reasons actuating the Mortgage Guarantee Company in instituting said action.

5. Answering the fifth paragraph of said amended petition, these respondents admit that approximately 93% of the holders of assignments of mortgages made by the Mort-
[fol. 37] gage Guarantee Company have agreed to the Readjustment Plan and have assented thereto, and these respondents admit that at the Extraordinary Session of the General Assembly of Maryland held in 1933, a Bill was introduced, which Bill with some changes was subsequently enacted by both Houses of the General Assembly under the approval of the Governor, and now constituted Chapter 56 of the Acts of 1933 (Extraordinary Session). These respondents aver the remaining allegations of said paragraph consist merely of averments of the conclusions of the pleader which do not require an answer by these respondents, but these respondents deny said allegations. These respondents further aver that the number of persons holding fractional interests in mortgages upon property in Baltimore City is very large and it is not possible

for these respondents to specify the number of such investors nor the amount of their investments, but these respondents in the course of their business have distributed fractional interests in mortgages on properties lying in Baltimore City as approximately twenty-three hundred investors who have invested a total amount of six million dollars and whose investments are represented by almost five thousand separate fractional interests in mortgages. For the purpose of protecting these investors and many others in the same position the Bill which ultimately became Chapter 56 of the Acts of 1933 (Extraordinary Session) was introduced in the General Assembly with the support and approval of the Insurance Commissioner of the State of Maryland, of the Attorney General of the State of Maryland and the Bank Commissioner of the State of Maryland, as well as with the support of the Mortgage Guarantee Company and the investors whom they represent.

6. Answering the sixth paragraph of said amended petition, these respondents admit the allegations of fact contained therein, but do not admit the expression of opinions and conclusions of the pleader. These respondents further aver that the United States Mortgage Company is the owner of twenty-one properties on Patapsco Avenue, including No. 1339, which is the security for the mortgage held by the petitioner, and these respondents aver that said United States Mortgage Company entered into a con- [fol. 38] tract with The Saratoga Building and Land Corporation, a wholly owned subsidiary of the Mortgage Guarantee Company, under the terms of which contract said Saratoga Company agreed to manage the properties aforesaid and to collect the rents therefrom and these respondents aver that prior to June 1933 the management of all of said properties was regarded as one transaction and was carried on the books of the Saratoga Building and Land Corporation in a single account; that since that date separate accounts have been maintained for each of said properties.

7. Answering the seventh paragraph of said amended petition, these respondents aver that said paragraph contains averments of the conclusions of law of the pleader, which these respondents believe to be erroneous.

8. Answering the eighth paragraph of said amended petition, these respondents aver that said paragraph contains averments of the conclusions of law of the pleader which these respondents believe to be erroneous.

9. Answering the ninth paragraph of said amended petition, these respondents aver that said paragraph contains averments of the conclusions of law of the pleader, which these respondents believe to be erroneous.

10. Answering the tenth paragraph of said amended petition, these respondents aver that said paragraph contains averments of the conclusions of law of the pleader which these respondents believe to be erroneous.

11. Answering the eleventh paragraph of said amended petition, these respondents aver that said paragraph contains averments of the conclusions of law of the pleader which these respondents believe to be erroneous.

12. Answering the twelfth paragraph of said amended petition, these respondents admit that the Preamble of Chapter 56 of the Acts of 1933 (Extraordinary Session) contains a finding that said Act is necessary because of an existing emergency. These respondents further admit that there was introduced at said Session of the General Assembly a Bill seeking to modify certain other remedies available to mortgagees, which Bill failed of passage. [fol. 39] These respondents deny the remaining allegations of said paragraph.

13. Answering the thirteenth paragraph of said amended petition, these respondents deny each and every allegation thereof and aver that said Act of the Legislature was passed for the purpose of correcting a condition which existed as a result of the interpretation heretofore placed upon Section 720 of Article 4 of the Code of Public Local Laws relating to the City of Baltimore, whereby the holder of any fractional interest in a mortgage, no matter how trivial, was held to be entitled to proceed under said Section to obtain a decree for the sale of the entire property covered by such mortgage. This condition of the law afforded opportunities to the holders of minute fractional interests to threaten to force the sale of large properties, which threat, if carried out under present conditions of the

real estate market would necessarily result in the destruction of the investment of all of the other holders of fractional interests in said mortgages, and would necessarily result in the further demoralization of the altogether abnormally depressed condition of the real estate market in the State of Maryland, with serious consequences to many savings banks, insurance companies, fiduciary institutions and trust estates having large investments in real estate, as well as to the owners of real property generally. Such legislation is universal in scope and is not limited to assignments of mortgages made by any single company nor to any particular form of assignments, but is equally applicable to all fractional interests in mortgages no matter how, nor by whom created. It is intended to modify an existing legal remedy which being entirely ex parte in character is peculiarly subject to abuse by the party having a small interest at stake to the prejudice of co-investors.

14. Answering the fourteenth paragraph of said amended petition, these respondents aver that same contains conclusions and opinions of the pleader and do not require an answer, but nevertheless these respondents deny each and every allegation thereof. These respondents further aver that there is nothing in said legislation to prevent any holder of any fractional interest in a mortgage guaran- [fol. 40] teed by the Mortgage Guarantee Company from asserting any remedy against the Mortgage Guarantee Company available to him prior to the passage of said Act.

These respondents pray that the petitioners' application for said decree be denied by this Honorable Court.

William L. Marbury, Jr., Knapp, Tucker & Thomas,
Solicitors for Respondents.

In Circuit Court No 2 of Baltimore City

Statement of Evidence

Testimony Taken in Open Court—Filed March 28, 1934

Before O'Dunne, J.

Wednesday, March 14th, 1934.

The above entitled cause came on for hearing before his Honor, Judge Eugene O'Dunne, on Wednesday, March 14th, 1934, at eleven o'clock A. M.

Messrs. Frederick H. Hennighausen and J. Calvin Carney appeared in behalf of the petitioners.

Messrs. Clarence A. Tucker, James Thomas and William L. Marbury, Jr., appeared in behalf of the respondents.

Thereupon C. ALEX FAIRBANK, JR., a witness of lawful age, produced on behalf of the petitioners, having been first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. Carney:

Q. Mr. Fairbank, your full name?

A. C. Alex Fairbank, Jr.

Q. You are a member of the Bar?

A. I am.

[fol. 41] Q. And you were formerly associated with the Mortgage Guarantee Company?

A. Until some time in January, 1933.

Q. In what capacity?

A. One of the vice presidents.

Q. And for how long a time did you serve in that capacity?

A. From the time of its organization.

Q. Which was when?

A. Well, it was 1905 or 1906, I believe. I have not got it accurately.

Q. In addition to that, you were also associated with the Title Guarantee and Trust Company, were you not?

A. I was.

Q. An affiliated organization of the Mortgage Guarantee Company?

A. Well, I was associated with the Title Guarantee and Trust Company; yes, sir.

Q. In what capacity?

A. As one of the vice presidents.

The Court: And he still is counsel, with Mr. Marbury, for the receiver of the Title Company.

By Mr. Carney:

Q. I hand you, Mr. Fairbank, assignment of mortgage of the Mortgage Guarantee Company to Mary E. Matthews

and John Matthews, dated July 30, 1932, covering an interest in a mortgage on 1339 Patapsco Avenue. Will you look at that and see if you can identify it as an assignment of a mortgage from the Mortgage Guarantee Company?

A. Yes, sir; I so identify it as an assignment of a fractional interest in a specified property.

(Note.) Paper referred to was thereupon marked and filed in evidence as Plaintiff's Exhibit No. 1.

Q. Now, for how long a time did the Mortgage Guarantee Company issue assignments of fractional interests in mortgages in this form?

A. It was started shortly after Mr. Albert G. Towers became the president of the Mortgage Company and that was either in 1917 or 1918. Prior to that the mortgages which they held were sold in an entirety.

Q. So that prior to 1917 or 1918, when Mr. Towers be- [fol. 42] came associated with the company you never did sell or assign a fractional interest in a mortgage, to your recollection; you sold entire mortgages, is that right?

A. Yes, sir.

Q. Now, this form which you have identified was not the form that was always used by the Mortgage Guarantee Company, was it?

A. No, sir.

Q. When was this form adopted?

A. Well, that form has been in existence, I presume, about ten years. Their first form was held to be taxable. The case went to the Court of Appeals. It was called Englar versus The State Tax Commission. After that decision this present form was adopted and the State Tax Commission held it was non-taxable.

Q. The case that was decided by the Court of Appeals, the Englar case, determined that it was not an absolute assignment of an undivided interest in a mortgage and therefore was taxable; isn't that true?

A. It held that it was a taxable security but it did not specifically say that it was not an assignment of the mortgage. You can argue that was the theory of the Court's decision.

Q. And after that decision, and only after that decision, this form of an absolute assignment of a fractional interest of a mortgage was adopted, in order to relieve the instru-

ment and the situation of any doubt that absolute title was passed to the assignee of a fractional interest in the assigned mortgage?

A. That was the purpose of it.

The Court: Of a non-taxable character.

The Witness: Yes, sir.

By Mr. Carney:

Q. And you think, according to your recollection, that was done about ten years ago and the result of that decision and since then, the Mortgage Guarantee Copmany has continued to issue assignments of this character exclusively in Baltimore City?

A. I know it was done after that decision. I am a little confused as to time, as so many things have happened.

Q. Now, this form, however, was only used in Maryland and for mortgages which the Mortgage Guarantee Com- [fol. 43] pany held outside of Maryland, you still used the old certificate form; isn't that true?

A. That is true.

Q. So that as to mortgages outside of the State of Maryland, the assignee or the holder of the certificate is not the absolute holder of an undivided interest in a mortgage?

A. Well, I would not like to say that because in my own judgment, and I have been wrong a good many times, I thought the original certificate really did that. In other words, I did not agree with the Court.

Q. As a matter of fact, though, the certificate that you are using in connection with the sale of partial interests in mortgages outside of Maryland is substantially the same form that the Court of Appeals, in the Englar case, said was not an absolute assignment.

The Court: He said he did not understand that. He said he thought that they were taxable.

Mr. Carney: Well, that is the record. Mr. Fairbank does say that apparently was the basis of their decision.

The Court: There is no use arguing with an opponent who does not agree with you.

Q. The effect of what you say is that the character of the security issued before that decision, which in that decision they declared to be taxable, is the system that they

continue now to maintain outside of Maryland; but to meet that decision, they set up a situation in the hands of a purchaser of a non-taxable security, they devised this method of conveyance and of sale and since that decision, which may have been, Mr. Fairbank thinks, may be some ten years ago, they have adopted a system in Baltimore City in this form which we are now offering as an exhibit. Is that a fair summary of your testimony?

A. Yes, sir.

Q. Mr. Fairbank, in addition to that, the Mortgage Guarantee Company continued to sell or assign entire mortgages; isn't that true?

A. That is true.

Mr. Carney:

In think it will be admitted by both sides in this case that Mr. Fairbank has had as much experience probably as any member of the Bar, and probably more, in the mortgage [fol. 44] business for the past twenty-five years, without going into detail?

Mr. Thomas: I think so.

By Mr. Carney:

Q. Mr. Fairbank, will you tell us, whether, to your knowledge, any mortgage companies or money lending institutions in Baltimore City, save and except the Mortgage Guarantee Company, during the past fifteen years have engaged or are now engaged in selling fractional interests in mortgages by assignments similar to the form which you have identified here?

A. I answer that question in this way. The Mortgage Company which was, and I suppose still is, associated with the Maryland Title Company did at the time of the Englar decision and subsequent thereto, sell fractional interests on mortgages on forms similar to that, and at the same time also had the pool arrangement. They had both plans. Now, whether today they have abandoned the plan similar to that which is represented by that certificate, I am not able to say.

Q. Mr. Fairbank, don't you know that the Maryland Title Company for some time past has not issued any such assignments as these and has entirely abandoned the idea and plan?

A. I do not know that definitely, Mr. Carney. I do not know that. I do know that when that form was adopted that both companies worked on the form and used the same lawyers and divided the fee in the adoption of the form.

Q. Mr. Fairbank, do you know of any individuals, savings banks, insurance companies or building associations that sell by assignment undivided interests in mortgages?

A. None other than what I have just tried to explain.

Q. So that the only other person or corporation, in addition to the Mortgage Guarantee Company——

A. You are referring now to Baltimore, Maryland?

Q. Yes, to the State of Maryland?

A. Yes.

Q. So that the only corporation or person that might be engaged in selling such interests by assignment might be the Maryland Title Company?

A. Yes and I do know that is a fact as of the present time.

[fol. 45] Q. Mr. Fairbank, at the time this act was prepared and introduced in the Legislature, you had ceased to have any connection with the Mortgage Guarantee Company?

A. Yes; I ceased some time in January, 1933.

Mr. Carney: I think that is all.

Cross-examination.

By Mr. Thomas:

Q. Mr. Fairbank, do you know whether or not the New York Title and Mortgage Company sold interests in mortgages or certificates in mortgages along the same general plan as your company?

A. I do.

The Court: In Maryland?

A. Oh, on Maryland property?

Q. Yes.

A. No, sir, I do not know that. I od not know they sold mortgages on Maryland property. I know they sold mortgages to Maryland people.

Q. You do not know whether they are on Maryland properties or Baltimore City properties or not?

A. I do not, sir.

Q. Do you know whether or not they operated along the same general lines?

A. I do, because I represent several clients who hold certificates in their mortgages.

Q. The New York Title and Mortgage Company had a Baltimore City office, did they not?

A. I think they did; yes, sir.

Q. It has been conceded in the case that you know more about the Mortgage business in Baltimore City than probably anyone else. Are you familiar with market conditions of real estate in Baltimore City?

A. The concession, in the first place, is very broad. I think, owing to contact with the mortgages of the Mortgage Guarantee Company and the Title Guarantee and Trust Company and other clients, that I have had a rather close contact with the real estate condition of Baltimore City and the State of Maryland.

Q. Will you tell his Honor what you consider the real [fol. 46] estate market in Baltimore City is at the present time; what is the condition of it?

Mr. Carney: We object, if your Honor please. This is an Act with respect only to certain types of mortgages and alleges an emergency which does not allege or attempt to sustain a general moratorium.

The Court: I know that. I will take the testimony for what it is worth and apply it to whatever extent it seems applicable.

Mr. Carney: In other words, as I understand it, your Honor, you cannot use the same facts and circumstances that you might use to sustain a general moratorium act.

The Court: I do not know what the answer is going to be yet. If the real estate drop in the City is universal, then all mortgages, the split mortgages of which they are a part and the ground work would also be affected. I have no way of knowing what his answer is going to be. I think I know what he is going to say, that the market is depressed. I have heard that from other sources. Go ahead, Mr. Fairbank.

A. I would describe it as being no market at all. You attend any number of public sales trying to make private sales and you simply cannot get a buyer. Although values are somewhat down, people are afraid to buy for numer-

ous causes, and his Honor has said it is depressed. I believe you can almost say there is no market. You go to sales and you attend sales with the auctioneer and trustee, and maybe the owner of the mortgage, and there are no buyers at all.

The Court: No buyers or bidders.
The Witness: No buyers or bidders.
Mr. Thomas: I think that is all.

Redirect examination.

By Mr. Carney:

Q. Mr. Fairbank, you do not mean to say you cannot sell a piece of property today if you offer it at auction, do you?

A. No, sir; I would not say no piece of property can be sold. I have sold a property myself recently but there [fol. 47] were particular reasons why there was a bidder and there was some slight competition. I foreclosed a mortgage on a manufacturing concern along the right-of-way of the Western Maryland Railroad. The Western Maryland Railroad was particularly interested in seeing to it that that property was maintained as a manufacturing place for the purpose of giving business to the Western Maryland Railroad. The Western Maryland Railroad bought the property.

Q. If I told you last Wednesday on a mortgage on which there was a balance due of $800, I conducted a sale, had fifteen people there and got $2,125 for that property, would you say there was no market for property today?

A. I would say there was a market for that particular piece. I was dealing generally, not with particular properties.

Q. Mr. Fairbank, you are familiar with the fact that at the last session of the Legislature there was introduced and not passed an Act which undertook to declare a general moratorium on mortgage foreclosures?

A. Yes, sir.

Q. And you know that the opposition to that was so severe that it did not go through or have a chance of going through?

A. Yes, sir.

The Court: Either house do you mean?

Mr. Hennighausen: It got through the Senate, your Honor.

The Court: You can refer to that in the Legislature proceedings, I suppose. I would like to see that. There was some reference made to it here in argument the other day.

Mr. Carney: We have procured for your Honor a copy of the bill, which did not go through.

The Court: I suppose they will admit this is a copy. I do not know whether it is or not.

Mr. Thomas: I do not think it is relevant. Of course, I will admit that is a copy of the bill, but I object to its relevancy.

[fol. 48] The Court: I will admit it for what it is worth, as bearing on the general emergency moratorium as to all mortgages and not limited to twenty-five per cent mortgages which was offered and not passed. It is Bill number what?

Mr. Carney: Senate Bill No. 67, sir, and we would like to introduce it in evidence.

The Court: All right, admitted. They accept it as copy, and object to its relevancy. I overrule the objection as to relevancy and admit it for what it is worth. Exception. In other words, as I understand it, the form of the proof is not objected to but the probative effect of it.

(Note.—Paper referred to was thereupon marked and filed in evidence as Plaintiffs' Exhibit No. 2.)

(Testimony of the witness concluded.)

Thereupon CHARLES H. BUCK, a witness of lawful age, produced on behalf of the petitioners, having been first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. Carney:

Q. Mr. Buck, you are preseident of the Maryland Title Guarantee Company?

A. Yes.

Q. Are you familiar with the form of assignment of partial interest in a mortgage used by the Mortgage Guarantee Company?

A. I have seen those forms.

Q. Will you look at that one?

A. Yes, sir.

Q. The Maryland Title Guarantee Company is engaged in the examination and guaranteeing of titles?

A. Yes, sir.

[fol. 49] Q. And lending money on real estate and selling of mortgages?

A. Not the latter. The Maryland Title Guarantee Company does not sell mortgages, its business is limited to the examination and guarantee of titles.

The Court: Have you a subsidiary or affiliated company?

The Witness: We have an associated company which owns a large part of our capital stock, which does sell mortgages. The name of that company is Maryland Title Securities Company. I am president of that company. It corresponds to the Mortgage Guarantee Company.

The Court: So your Title Company does a business like the Title Company across the street and you have a mortgage company which is operated very similar to theirs, of which the Maryland Title Securities Company is the name and you are the president?

The Witness: Yes, sir, that is right.

By Mr. Carney:

Q. Mr. Buck, does the Maryland Title Securities Company sell and issue assignments of partial interests in mortgages on forms similar to the one you have identified?

A. Until a little over a year ago it sold what we call partial assignments of mortgages. The form, although in effect the same as the form which you have just shown me, is not similar in its wording. That is, the plan of sale is different from that which was used by the Mortgage Guarantee Company.

Q. What was, briefly, the plan of sale used by the Maryland Title Securities Corporation?

The Court: Have you got a copy of your form?

The Witness: I haven't with me, sir.

The Court: Well, you can get it.

The Witness: I can furnish a copy. Under our plan, a conveyance of the entire mortgage was made to a trustee and a definite interest in that mortgage was sold by the issuing company; the trustee having assumed by the assignment of the particular mortgage to it all of the rights of the mortgagee and having assumed to enforce the covenants of [fol. 50] the mortgage that run for the benefit of the mortgagee.

Q. So that under your plan of operation the assignment made to the purchaser did not confer upon the purchaser of that interest the right to an undivided interest in that mortgage and right to enforce the covenants of that mortgage?

Mr. Thomas: I object to the question.

The Court: I will sustain it because you are asking him to interpret the legal effect of it. The most he can do is to file a copy of it and leave the construction of it to the Court.

Q. Mr. Buck, could you conveniently let us have a copy of the form you use?

A. Yes.

The Court: Does the paper show that the purchaser got something issued by that trustee to whom the mortgage was assigned?

The Witness: Yes, sir; a beneficial interest.

The Court: Issued by the trustee?

The Witness: Assigned by the trustee; yes sir. The trustee had taken an assignment of record of the mortgage and had assumed to perform the covenants of the mortgage for the benefit of the mortgagee in the mortgage.

Q. Was the form of the assignment such as could or was recorded, Mr. Buck?

A. I know of no instance in which any of them were recorded.

Q. They were not intended to be recorded?

Mr. Thomas: I object to that question.

The Court: I sustain the objection to that.

Q. Mr. Buck, I understand even that plan has not been in use by the Maryland Title Securities Company for over a year?

A. No. We have sold no mortgages in the Maryland Title Securities Company for over a year.

Q. Was your plan of sale of fractional interests in mortgages similar to, in legal effect, the assignment of the [fol. 51] plan of operation engaged in by the Mortgage Grarantee Company?

(Question objected to; objection sustained; exception noted.)

The Court: He is going to bring a copy over, then we can compare the two exhibits.

Q. Mr. Buck, do you know of any company in the State of Maryland selling a fractional interest in mortgages upon the plan engaged in by the Mortgage Guarantee Company other than the Mortgage Guarantee Company?

A. I know of none that used the same as that of the Mortgage Guarantee Company.

Q. Now, to your knowledge, did any companies under any plan or method, except the Mortgage Guarantee Company on this plan and the Maryland Title Securities Company under your plan, in the State of Maryland, as to mortgages on Maryland property, sell fractional interests in mortgages?

A. I know of none.

Q. How long, Mr. Buck, have you been associated with the Maryland Title Guarantee Company and the Maryland Title Securities Company?

A. Since the organization of each. With the Maryland Title Guarantee Company since 1913. The Maryland Title Securities Company was not organized until about two and one-half or three years ago.

Mr. Carney: That is all.

Cross-examination.

By Mr. Thomas:

Q. Mr. Buck, you are familiar with the operation of the Maryland Mortgage Company, are you?

A. Maryland Mortgage Company?

Q. Yes. Wasn't it the Maryland Mortgage Company or Maryland Mortgage and Title Company?

A. I am somewhat familiar with that. I had nothing to do with the organization of that company or its major operations. I have the outsider's knowledge of it.

[fol. 52] Q. Can you tell us whether or not the Maryland Mortgage Company sold to the public beneficial interests certificates, so-called certificates in mortgages, whether under the pool arrangement or otherwise?

Mr. Hennighausen: If your Honor please, we think it should be restricted to the State of Maryland.

Q. In the State of Maryland?

The Court: Answer it.

A. Yes, they did.

Q. Can you tell us, even approximately, the number of those certificates that were sold in Maryland?

A. I haven't the slightest idea.

Q. There were many millions of dollars of them, were there not?

A. That depends on what you call many millions of dollars.

Q. Well, it was more than one million, wasn't it?

A. I don't know.

Mr. Carney: If your Honor pleases, all of this testimony is irrelevant. I am familiar with the Maryland Mortgage Company's operation. They did not assign mortgages, they issued bonds. Why not bring it out now and get it over with?

The Court: If you can bring it out, bring it out.

Mr. Carney: They did not assign mortgages. This legislation cannot possibly have any bearing on that. They are not mortgage certificates, they are bonds, so-called, and they cover no rights in the mortgage.

The Court: Gentlemen, you are not getting anywhere arguing among yourselves. You have not offered and filed and had marked the exhibit which you refer to.

Mr. Carney: Yes, sir, it is in evidence and marked, sir.

Redirect examination.

By Mr. Carney:

Q. Mr. Buck, isn't it true that the Mortgage Company of Maryland did not issue to the purchasers assignments of

[fol. 53] definite interests in the mortgage, it issued through the mercantile Trust so-called Gold Mortgage Bonds?

A. That is my understanding of it. I think we all understand that.

Mr. Carney: That is all, Mr. Buck.

(Testimony of the witness concluded.)

Mr. Carney: If your Honor please, I understand it is admitted by the other side that there are three years taxes upon this particular property; 1932 taxes amounting to $67.88, 1933 taxes amounting to $76.79; 1934 taxes amounting to $72.27. I would like the record to show that.

The Court: Is that admitted?

Mr. Thomas: I admit the tax man would testify to that if he were here, but I do not admit the relevancy of it at this hearing.

The Court: I will admit it as to the fact that the taxes in those amounts for those years are open and unpaid.

(Hearing not concluded, to be resumed at a later date.)

Before Eugene O'Dunne, J.

March 19, 1934, 10 A. M.

Thereupon CLARENCE A. TUCKER, a witness produced on behalf of the complainants, was duly sworn according to law, and testified as follows:

Direct examination.

By Mr. Carney:

Q. You are a member of the Bar and counsel for the Mortgage Guaranty Company?

A. That's right.

[fol. 54] Q. Now, in your answer filed in this case you recite and rely upon Chapter 56 of the Acts of 1933. Did you have anything to do with the preparation of that Act of the General Assembly?

Mr. Thomas: I object.

The Court: Why?

Mr. Thomas: I think the Act with its preambles is a legislative function, and I do not see where it is material to ask the witness what he was doing and what his purpose was. If nothing was said in the preamble in Act or the Act itself does not make it material.

The Court: On that ground I will overrule it. Exception.

The Witness: Yes, I had something to do with that.

Question by Mr. Carney:

Q. And by whom was it suggested you assist?

Mr. Thomas: I object.

The Court: Sustained.

Question by Mr. Carney:

Q. What did you have to do with the preparation of the Act?

A. The Court of Appeals had construed the Act allowing assents to decrees to be put in the mortgage as meaning that anybody who had an interest in the mortgage, or who held fractional interests in the mortgage, could apply for and secure such decree. I drew an act in which the Legislature declared that was not the intention of that Act. Following that there was a conference—the companies guaranteeing mortgages in Baltimore being under the supervision of the insurance companies—with the Insurance Commissioner and the Attorney General's office, and as a result of that conference that particular Act was not introduced, and it was agreed that there should be introduced an Act in the form which you now have it as passed by the Legislature. I dictated that Act and it was subsequently passed, with some changes more or less of a minor nature, I think, after it had been further taken up with [fol. 55] the Attorney General, and referred to Dr. Flack, of the Legislative Reference Department.

Q. Boiling your testimony down, this Act was prepared by you, introduced and passed by the Legislature?

A. I do not recall who introduced it. It was introduced, and passed by the Legislature.

Q. You prepared it?

A. I dictated it in the first place, with some slight changes.

Q. And you had it introduced?
A. Well, it was actually taken down to the Legislature.
Q. By your law partner, Mr. Knapp?
A. Yes.

Q. Prior to the time of preparation and introduction of the Act by you and your firm, you on behalf of the Mortgage Guarantee Company, or others, had filed a number of foreclosure suits in this and the other Court, foreclosing mortgages where you represented less than one hundred per cent of the mortgages. Is that true?

Mr. Thomas: Objected to.
The Court: Overruled.

A. There had been some petitions filed for decrees of foreclosures. There had not been any foreclosures. But there had been several applications made to the Court and decrees obtained for foreclosure, and attempted foreclosure, putting the property up when there was absolutely no sale or market; and in many of these instances the applications were by people who were sometimes holders of less than ten per cent of total under investment.

Q. What I am referring to are the activities engaged in by you and your office and the Mortgage Guarantee Company prior to the enactment of this statute, where you yourself foreclosed mortgages where you represented less than one hundred per cent. Will you tell us the cases in which they did that?

A. I cannot recall the cases. There were no foreclosures. Applications and petitions were filed and decrees obtained, but I do not recall any actual foreclosures or any attempt to sell the property.

[fol. 56] The Court: I suppose you are using "foreclosure" in the loose, popular sense?

The Witness: I said there had been some application for the decree but no sale or attempted sale after the decree was obtaind.

The Court: I mentioned the fact, because in Mr. Thomas' brief he draws a technical distinction that the practice in vogue in Baltimore City for more than one hundred years, commonly called foreclosure of mortgages, is not the old system of technical foreclosure of a mortgage, but is the one hundred year practice of Baltimore City, since the Act

of 1825, of consent to decree of sale contained in the mortgage, and commonly spoken of as mortgage foreclosure.

The Witness: Right.

Question by Mr. Carney:

Q. I have some of the cases you filed before me, and I want to read them off, and see if you admit the petition for foreclosure, and how it brought on the emergency which you say existed, and which was part of the emergency created by you?

Mr. Thomas: Objection.

The Court: Sustained. I sustain objection to the form; to that part where you say, "part of emergency created by you."

Mr. Carney: That will come out, sir.

Question by Mr. Carney:

Q. Is it or not true that you filed petition for foreclosure of mortgage executed by the Columbia Realty Company on apartment house property, St. Paul and Thirty-second Streets?

Mr. Thomas: Object, your Honor.

The Court: Well, now, I do not see where the specific instances are going to be material. I understand Mr. Tucker's was that he did, before the Act was passed, get a number of consent decrees and appointed trustee to make sale, but he has not said they made any sales. He had [fol. 57] authority. That is what he referred to and he refers to in applications for foreclosure. What would be the materiality to show the particular one, unless that's the very one involved?

Mr. Carney: I want to show, if any emergency was created or existed, it was the fault of the Mortgage Guarantee Company; and you certainly cannot create an emergency and take advantage of it.

The Court: That does not answer my question—materiality of a specific instance.

Mr. Carney: Mr. Tucker's testimony was that he represented interests less than the whole. I want to show—that is whether 100% either in name and amount—whether someone else might have filed an action——

The Court: I see no real objection to it.

Mr. Thomas: It is not very important, your Honor, and under consent decree a decree may be entered immediately upon the recording of the mortgage. The mortgage does not have to be in default.

The Court: It was not, as a matter of fact?

Mr. Thomas: I do not know whether it was or not. Irrespective of whether it was in default or not——

The Court: Let them take the testimony to see whether it was the practice immediately after the mortgage was signed or sometime after.

Question by Mr. Carney:

Q. Do you recall that foreclosure suit directing the trustee to sell——

A. Is that the St. Paul Court Apartments?

Q. Yes.

A. Yes, I recall filing a petition and getting decree in that case. I think it was filed in this Court.

Q. 42-C, folio 431. Did you also file similar proceeding for foreclosure against the Forest Court Apartment?

Mr. Thomas: I object.

A. If I can recall the case, I did. I think that is the case we argued before Judge O'Dunne the other day. It was [fol. 58] an application for the appointment of a co-trustee to direct an immediate sale, and if that's the case, the Court refused appointment of co-trustee but directed me. I do not know that the order has been passed. I did not know it had been passed even, to make the sale.

The Court: After 45 days advertising, so as to allow for possibility of decision in the Court of Appeals in No. 39, before the advertisement ran out.

Question by Mr. Carney:

Q. You also filed a similar petition for foreclosure and secured decree against Hilton Court Apartment Company?

A. I do not recall that, but if you have the reference to it I am satisfied that it is correct.

Q. Did you file similar proceedings against the Roland Park Apartments Company?

A. Yes.

Q. Stratford Apartment Company?
A. Yes.
Q. Whitepark Apartments?
A. I do not recall that.
Q. Whitelock and Park Avenue?
A. I do not recall that.
Q. These were all filed by you prior to this Act?
A. I cannot tell you because I do not recall the dates, but it's a very easy matter to get those dates.
Q. But you do not want to tell the Court you filed any proceedings where the amounts were less than specified by the Act after the Act?
A. I do not think you have asked for any, but practically in all those instances I was representing from, I would say from about 97% or 98%. And in some of those instances there was no default in the mortgage at all of any description. The case in the Court of Appeals had not been in default at the time the decree was obtained.
Q. Is it not a fact that this bill prepared by you and introduced by your office was primarily and solely for the benefit of the Mortgage Guarantee Company?
A. I would say it certainly was not primarily for the benefit of the Mortgage Guarantee Company. It was for the purpose of protecting an investment against the precipitate action by small holders who had little or nothing [fol. 59] to lose, and particularly in instances where he was getting a trusteeship or co-trusteeship thereby.

The Court: There has been no co-trustee appointed in this Court.
The Witness: One. In reference to the Jefferson Apartments. Your Honor appointed Mr. Hennighausen and myself co-trustees.

Question by Mr. Carney:

Q. At the time you drew this Act you represented no other company except the Mortgage Guarantee Company?
A. That's correct.
Q. And so this Act was drawn on behalf of the Mortgage Guarantee Company and on behalf of the people they represented?
A. It was certainly not drawn for the benefit of the Mortgage Guarantee Company. It was drawn for the pur-

pose of protecting the investment, where these mortgages were split up into small parts and to prevent precipitated action on the part of very small holders.

The Court: But which mortgages were held by the Mortgage Guarantee Company?

The Witness: So far as I know, yes. Certainly the mortgages talked about this morning were made originally to the Mortgage Guarantee Company, but at this time were held by people to whom fractional interests had been assigned and recorded.

Question by Mr. Carney:

Q. Now, I understand you to say this legislation was not for the benefit of the Mortgage Guarantee Company?

A. That's correct.

Q. It is not true they were sold with a mortgage guarantee attached to them?

A. That's correct.

Q. And if foreclosure were instituted, they would be liable under their guarantee if they were not otherwise waived or released?

A. Yes.

Q. Is it not true that at the time the Act was drawn and passed there had been a plan promulgated under which the [fol. 60] Mortgage Guarantee Company had full control of the mortgages, servicing of them, payment of interest, and so forth?

Mr. Thomas: Object.

The Court: Let him answer.

A. A reorganization plan had been promulgated by the Mortgage Guarantee Company, and I do not know whether a copy of that plan is introduced in this particular proceeding or not, but under the plan, as to those who assented to it, the Mortgage Guarantee Company had a large measure of control.

Mr. Carney: If your Honor please, we would like to offer a copy of that plan. It is not here now but we can produce it.

The Court: All right.

Mr. Carney: That's all.

Cross-examination.

By Mr. Marbury:

Q. Is it not a fact that the mortgages that were issued by the Mortgage Guarantee Company having their guarantee, are held widely by the general public in Baltimore City and Maryland?

A. That's true.

Q. And is it not also true these mortgages were split up into small units?

A. That's right; sometimes as low as forty-five dollars.

Q. And isn't it also true that those different fractional interests represented in the aggregate a large interest in real property in Baltimore and Maryland?

A. In Baltimore approximately six million dollars; in the State probably two or three millions more.

Mr. Carney: I want the split mortgages and whole mortgages assigned.

Question by Mr. Marbury:

Q. Isn't it also true that there were split mortgages issued by other companies beside the Mortgage Guarantee [fol. 61] Company?

A. That's true. Of course, bond issues are split mortgages in a measure.

Mr. Carney. I object.

Mr. Marbury: I think we have a right to show conditions which faced the Legislature.

The Court: The whole picture.

Mr. Carney: This Act only shows a definite type of legislation and this testimony ought to be so confined. Bonds do not confer right upon the holders to foreclose.

The Witness: I have seen a good many bond issues and have never seen any yet that did not.

The Court: There was a statement here that most bond issues in the indenture itself had a statement in it that no holder of less than twenty-five per cent should have any right of foreclosure. That did not rely upon an act of the Legislature. But these mortgages did not have such clause in the mortgage. I do not know whether that is the evidence in the case, or a thought I had in my mind from statement by counsel.

Question by Mr. Marbury:

Q. Isn't it also a fact that these split mortgages were originally sold in large mortgages?

A. That's true.

Q. And which would mean the usual properties of large value?

A. That's correct.

Q. Is there any market for large property at this time?

A. Absolutely none.

Q. Is it not also true if several millions of that property were forced for sale, it would have a very dire effect on the market of real estate in Baltimore City today?

A. I think so.

Mr. Carney: Your Honor, the issue is as to a little two-story house. We are not speaking about an emergency.

The Court: I will take his answer. At best it shows it si his mere guess, or expression of opinion. No witness can say in advance whether an apartment house put up for sale will bring a fair price.

[fol. 62] The Witness: I think I answered that by saying that is my opinion.

Question by Mr. Marbury:

Q. Isn't it also true that savings banks in this city have large interests in real property?

A. That's quite true.

Mr. Carney: Objected to.

Mr. Hennighausen: Objected to.

The Court: Sustained. Unless banks have an interest in split mortgages.

Mr. Marbury: I may be wrong about it, but any act that would destroy generally would have a direct economical effect on interests of everybody in this city.

The Court: Well, if you think it would, I will take the testimony.

Question by Mr. Marbury:

Q. Mr. Tucker, savings banks hold a large investment in real property in this City?

A. That's right.

The Court: Do any of them have what we call split mortgages?

The Witness: No. In most instances they are not split. If there are any I do not know of them.

The Court: Straight lenders. They do not on mortgage on apartment houses?

The Witness: No.

The Court: Insurance companies do?

The Witness: Yes, and non-business properties.

Mr. Carney: There are no split mortgage transactions until those engaged in by the Mortgage Guarantee Company.

Question by Mr. Marbury:

Q. Isn't it also true that a number of split mortgages are held by trust estates?

A. Yes.

[fol. 63] Q. Now, you have been asked about the number of petitions which you filed for decrees in cases that Mr. Carney has listed. I think there should be some explanation of the reason why those proceedings were instituted. Will you state what conditions existed that led up to the institution of those proceedings?

A. There had been several ex parte applications by very minute interests in those split mortgages and decreees secured and notices given that the property was going to be advertised for sale.

Q. Who was named trustee in those proceedings?

A. The trustees were counsel of those small interests.

Q. And had other persons interested been advised that those properties would be offered for sale?

A. They had.

Q. So that's the reason you filed those other proceedings?

A. That's correct. They were filed to prevent the holder of a small interest—they were filed to prevent this ex parte precipitate action. The only notice the other interests would have would be mere constructive notice of filing. There was no actual notice with the holders of the balance of the mortgage.

Q. This act provides there must be the concurrence of holders of 25% in amount of the face value of the mort-

gage before an assent to decree may be obtained under the Act of 1825?

A. That's correct.

Q. Were you responsible for 25%?

A. No, that suggestion was made by Mr. Henderson, Assistant Attorney General, following what is not unusual in bond issues. The original draft I had was merely an interpretation of the statute and which prevented any foreclosure by any other than 100%. The original act simply gave the mortgagee the right to secure this decree where consent was contained in the mortgage. The Court of Appeals construed that as giving the same right to fractional interests in the mortgage. The act as I drew it declared that was not the intention of the Legislature

Question by Mr. Marbury:

Q. I understand it was subsequently revised at the suggestion of the Attorney General?

A. That's right.

[fol. 64] Q. And a second act was prepared as a result of your conference with the Attorney General?

A. That's right.

Q. The 25% was used by reason of it being common in bond issues?

A. That's right; not less than 25%, and in most instances requires the majority.

The Court: Why was that not put in these mortgages?

The Witness: It was not usual to put in straight mortgages.

Mr. Carney: It would affect their marketability—no restrictions on them.

The Witness: I do not think anyone had ever dreamed a fractional interest could do it.

Mr. Carney: That's been some time ago?

The Witness: Yes. The cases were 84 or 86 Maryland, probably twenty-five or thirty years ago.

Mr. Carney: So that twenty-five years ago no one thought it wise to change that?

The Witness: No. I doubt if anyone knew of it.

Mr. Carney: If your Honor please, I would like to offer enough data from these foreclosure suits to indicate the

properties on which he docketed foreclosure suits and the amounts.

Columbia Realty Company, date of mortgage is February 18, 1924. The mortgage is in the principal sum of $300,000. The petition for a foreclosure and the decree both entered on the same day, October 23, 1933. I call attention of the Court to the fact it is the regular form of decree appointing Mr. Tucker to make sale of the property after default

The next one is versus the Stratford Apartment Company; mortgage dated December 28, 1932 in the principal sum of $115,000; foreclosure and decree September 31, 1933; decree appoints Clarence A. Tucker in the usual form to make sale of this property, the mortgage being in default.

[fol. 65] The next, against White Apartments Company on mortgage dated November 18, 1926, in the principal sum of $75.000; foreclosure and decree September 21st, 1933; decree appoints Clarence A. Tucker trustee in the usual form to make sale of the property, the mortgage being in default.

Roland Park Apartments Company on mortgage dated January 20, 1925, in the principal sum of $550,000; foreclosure docketed September 20, 1933; decree same day appointing Mr. Tucker to make sale, mortgage being in default.

Forest Court Apartment; mortgage dated March 31, 1923, in the sum of $150,000; foreclosure and decree entered on same day, September 20, 1933, appointing Mr. Tucker in the usual form trustee to make sale, the mortgage being in default.

The next, Hilton Court Apartments Company on mortgage dated April 30, 1921, in the principal sum of $124,000; foreclosure and decree entered same day, September, 1933, appointing Mr. Tucker trustee in the usual form to make sale, mortgage being in default.

Question by Mr. Carney:

Q. When you took out these various decrees on behalf of the so-called majority holders in interest, the minority holders had the same right to enter decrees if they saw fit. Is that true?

A. Under the decision of the Court of Appeals at that time, yes.

Question by Mr. Thomas:

Q. I understood you to say that the Act was drawn so as to change—treating the brief cited therein, the interpretation of the statute authorizing decrees based on assents—to change the interpretation of that statute that occurred in one of the decisions of the Court of Appeals?

A. That's right.

Q. Richardson vs. Owings, 88 Md. 663?

A. That's correct.

Q. The act was not designed to be limited in its application to any particular character of undivided interest in mortgages, was it not?

A. That's right.

[fol. 66] Q. The purpose was to cover an undivided interest in mortgages no matter how in evidence or represented?

A. That's right.

Mr. Thomas: That's all.

Mr. Carney: That's all, your Honor.

Thereupon ARTHUR A. LOTH, a witness produced on behalf of the plaintiff, after being duly sworn according to law, testified as follows:

Direct examination.

By Mr. Carney:

Q. Is the Saratoga Building and Loan Corporation a subsidiary of the Mortgage Guarantee Company?

A. Yes.

Q. How long have you been employed by them?

A. About twelve years.

Q. Do you have with you your records with respect to 1339 Patapsco Avenue?

A. I have them.

Q. How long has the Mortgage Guarantee Company been servicing that property?

A. Since June, 1932.

Q. What do your records show with respect to collections and expenses?

A. We have collected $63.00 in rents and expended $373.63, representing a net debit of $310.63.

Q. Who is the owner of this property at this time?

A. I think the United States Mortgage Company.

Q. And you are handling it under what kind of arrangement?

A. Management agreement.

Q. So that during that period of approximately a year and a half you lost $310.00 handling the property?

A. That's right.

[fol. 67] Q. How are you to be reimbursed for that sum?

A. By rentals. The property was in very bad condition at the time we took it over and a considerable amount of that money was spent to put it in good condition. There being so many of those houses down there, the demand has been low and the property has been empty from June, 1932 until January of this year.

Q. On this particular street there are seventeen of those houses?

A. I think so.

Q. And seventeen rented?

A. I could not answer that right now. There are twenty-one houses there on Patapsco Avenue.

Q. Of this type?

A. No, fifteen of one type and six of another. That is, it was turned over to us for management.

Q. How many years taxes were open on this property?

A. I do not have that available.

Q. Were any taxes open?

A. I think so.

Q. Don't you know from your records?

A. I do not have the complete records here with me.

Q. Have you been paying out any interest on this mortgage and charging to the property before you paid the taxes?

A. I think they have.

Q. How much?

A. I could not tell you that directly. At the time the United States Mortgage Company—we took the management of that property it was twenty-one houses under seventeen mortgages. We treated that as an account directly with the United States Mortgage Company, and all

receipts and disbursements we charged or credited to that account. It was not kept with specific houses until June of last year, when we changed our bookkeeping methods, and since then I have the specific items on that house. A good bit of the expenses is management and general repairs that was done on the row, and was charged to the United States Mortgage Company instead of the individual property. I could probably go in and analyze some of those particular items.

Q. Since you took over the management have you paid any taxes?

A. I cannot answer that.

[fol. 68] Q. Is it not true that you haven't paid any?

A. I cannot answer that.

Q. How much have you paid in interest?

Mr. Tucker: I object.

The Court: Sustained.

Question by Mr. Carney:

Q. Since June, 1932, what amounts have you paid in interest on this mortgage?

A. I could not answer that.

Q. Not with the information you have available?

A. I could get it.

Q. Will you tell us how you paid out $373.00? Tell us how that's made up?

The Court: I do not want the details. But is there any taxes included in that?

The Witness: I do not think there is any taxes in that.

The Court: Any interest in that?

The Witness: I think there is.

The Court: How much?

The Witness: Several items paid to the Mortgage Guarantee Company that usually is interest. I think these are all interest items. On July 13th, 1932, $72.50——

The Court: Just summarize the total amount.

The Witness: There was $1,224.34; $120.00; $286.39.

Question by Mr. Carney:

Q. Those sums are far in excess of $300.00?

A. This is an account with the United States Mortgage Company and not on that specific piece of property. Our

accounts were handled direct with the company as a whole.

Q. You cannot say what amount you paid out and what amount you received on this particular piece of property?

A. I can get it.

[fol. 69] The Court: He did not bring the records. Can you get them?

The Witness: In time, yes.

The Court: What do you mean, in time?

The Witness: I have to dig in those records for two years to get them.

Question by Mr. Carney:

Q. How much of the sum you mentioned includes service charges or management fees or bonus charges paid to the Mortgage Guarantee Company?

A. In arriving at the figure I gave you, we had expended up to May, 1933, an amount of money for the twenty-one properties, and each month 1/21 of that was pro rated to this property. After May, 1933, I have the specific charges against the property.

Q. Well then, all you did was take the aggregate expenses and give us 1/21?

A. Until June, 1933.

Q. Did you not know this was a separate mortgage?

A. We had an account directly with the United States Mortgage Company.

Q. How much does you- record show was paid to the Mortgage Guarantee Company as bonus, renewal fees, and so forth?

A. You ask it of this specific piece of property.

Q. On twenty-one pieces or this particular piece of property?

A. $531.00.

Q. How much is bonus?

A. I do not think there is any bonus in it. It's all interest charges.

Q. No bonus charges for renewal?

A. I do not know.

Q. With respect to handling?

A. 5%.

Q. Repairs?

A. No restrictions on that.

Q. You can make any charge you care to?

A. No, we charged for the repairs made but did not keep charges against the specific piece of property. We charged it all to the United States Mortgage Company.

[fol. 70] The Court: Then there might be charges against any one of the twenty-one pieces and that one particular house did not have any repairs on it at all?

The Witness: That's possible.

Question by Mr. Carney:

Q. This assignment my client secured was made on the 30th of July, 1932, after they took control over of the property.

The Court: Well, they handled that as a block. A sum total was spent in repairs. It was charged against the whole and then divided into twenty-one elements and blanketed over each one in equal proportion.

Mr. Marbury: They were acting as agents for the owner and charged it in one account.

Mr. Carney: That's all.

The Court: Any questions by your side, Mr. Thomas?

Mr. Thomas: I do not think so. No, sir.

(Testimony of witness Loth concluded.)

Thereupon J. Calvin Carney, a witness of lawful age, produced on behalf of the complainants, after being duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. Hennighausen:

Q. You are a member of the Bar?

A. Yes.

Q. You have been practicing for sometime?

A. I have been.

Q. Have you examined the property 1339 Patapsco Avenue involved in these proceedings?

A. I made an exterior examination yesterday.

[fol. 71] Q. Tell us what sort of property it is?

A. A two-story brick dwelling house, located on Patapsco about one and a half blocks west of Pennington Avenue. The lots are approximately 16 x 75. It is a daylight type of house; sun parlor in the front; garage in the basement of the house. You drive in from the alley or yard. The exterior appears to be in good condition. The neighborhood, so far as Pennington Avenue is concerned, is apparently in rentable shape. There are seventeen houses of this type in the block and they are all rented. There are eight of another type not as attractive to the west and seven of those are rented. A sign on this property indicates they are endeavoring to rent it for $25.00 a month. It's a sign of the Saratoga Building Association. Patapsco Avenue is a wide thoroughfare; street car tracks in the center and a driveway of asphalt on either side.

Q. In your practice you have had occasion to offer for sale numerous dwelling properties under foreclosure decrees?

A. Yes.

Q In your opinion, this property would be sold at public auction——

Mr. Tucker: I object.

The Court: Sustained. Ask him his general experience with building associations and how familiar he is with the property.

Question by Mr. Hennighausen:

Q. Will you tell us your experience with property in the City of Baltimore?

A. Since I was admitted to the Bar in 1918, a very large part of my transactions has been with respect to real estate transactions, and representing building associations. At this time I represent five.

Q. What has been your experience in sales of foreclosure that you have?

A. I do not have the pessimistic view others have. I think real estate still has a substantial value. My experience in real estate conducting foreclosure sales has been generally good. I had one on Linnard Street, 629, and we sold it for $2125.00, subject to $90.00 ground rent. Rental [fol. 72] out there is only $35.00 a month. They are Keelty houses. The mortgage was $1300.00; we got $2125.00.

Q. Based upon your experience——

A. I might add I attended another sale and bought a piece of property myself for $4050.00.

Q. Based upon your experience and also upon your inspection of 1339 Patapsco Avenue, will you tell us whether, in your opinion, an advantageous sale can be made?

Mr. Thomas: Object, your Honor.

The Court: Ask him what, in your opinion, the fair market value is.

Question by Mr. Hennighausen:

Q. What would be the present market value, in your opinion?

A. Somewhere between two and three thousand dollars. The difficulty with the mortgage is that in good times somebody got the money and did not pay off on the mortgage. If properly reduced, the mortgage would be down to two thousand dollars and relatively safe. They allowed the mortgagor to pay very little in good times. The mortgage was on there approximately nine years, and allowed the mortgagor to pay only $50.00 on the principal. It was improperly serviced and handled——

Mr. Thomas: I object—airing of Mr. Carney's views.

The Court: I will let it stand for what it is worth. Exception.

Mr. Hennighausen: That's all the testimony we have your Honor.

The Court: Plaintiff closes. Any testimony to be taken by the other side?

(Testimony of witness Carney concluded.)

[fol. 73] Thereupon BLANCHARD RANDALL, JR., a witness of lawful age, produced on behalf of the intervening respondents, after being duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. Thomas:

The Court: Give your name and business and business address.

The Witness: Blanchard Randall, Jr., President, Mortgage Guarantee Company, 28 E. Fayette Street.

Question by Mr. Thomas:

Q. You are President?

A. Yes.

Q. You were requested to prepare certain data tending to show the number of mortgages, the number of fractional interests or parts thereof that your company has caused to be placed on property in Baltimore City and the fractional interest to be distributed to the transferee. Have you prepared that?

A. Yes.

Q. Will you get it out?

A. It was not prepared by me personally.

The Court: Let us have it.

Mr. Carney: That is not in the form suggested. The suggestion was they give us the data with respect to split mortgages, and where they have assigned whole mortgages it should not be included in the amount. On the sheet here they have not attempted to segregate——

The Court: It may not be complete but that would not affect admissibility for what it is.

Mr. Thomas: I think if you read this certificate you will see——

The Court: Well, let me see it.

(Discussion at the Bench between Court and Counsel followed.)

[fol. 74] Mr. Thomas to the Witness: The Court suggests this certificate be gotten up in greater detail.

The Court: I am trying to save somebody some expense. They say assignment of mortgages includes whole mortgages.

Mr. Tucker: The whole are separated from the fractional.

The Court: I will admit it.

(Thereupon, said paper writing referred to was admitted in evidence and marked, "Defendants' Exhibit X.")

Question by Mr. Thomas:

Q. Mr. Randall, under Defendants' Exhibit X, "Certificates and Assignments," "Number of Mortgages," and the words "Baltimore City," and the figures, 190, under

number of mortgages, will you please tell the Court what 190 mortgages signfies?

A. It means 190 which were sold on certificate or partial assignment basis; not outright to any one person.

Q. Am I correct then, placing it in this language, 190 which were split, and fractional interests sold to the public?

A. That's correct.

Q. 4911 represents what?

A. The number of certificates and assignments contained in these 190 mortgages.

Q. 2300?

A. Individuaal persons who hold those 4900 certificates.

Q. Amount?

A. Is the total amount of the 190 mortgages.

Q. And the last column "Average."

Mr. Hennighausen: We object to average.

Mr. Thomas: I will withdraw the question.

Question by Mr. Thomas:

Q. Have you any data with you which tends to show the amount in dollars or percentage that are held in these respective mortgages or any other, held by individual investors? Have you any data with you which would indicate the respective amounts in which individuals hold fractional interests in the 190 mortgages?

[fol. 75]

A. The size of those certificates range from a low of $45.00 up to in excess of $10,000. There are according to partial list, 29 certificates of $10,000 or more; 13 certificates I know of of $100 or less. There are approximately 1300 of exactly $100.00, and others of varying amounts between those limits.

Q. On Defendants' Exhibit X, under "Maryland Counties," I assume the 138 and the other data corresponds with the meaning of the data given for Baltimore City?

A. Yes.

Q. Down the bottom of this exhibit appears, "Mortgages Outright." Will you explain that?

A. Those are mortgages sold outright to one holder and not divided up into participations.

Q. Am I correct in assuming that you mean, were not divided by you into participations?

A. That's right.

Q. And if any sub-dividing was done between several that has not been done by you?

A. No.

Cross-examination.

By Mr. Carney:

Q. On those properties covered by those mortgages how many of them are now owned by the Mortgage Guarantee Company of any subsidiary, or which you are now servicing under agreements similar to the one with the United States Mortgage Company?

A. I cannot give that exactly.

Q. Approximately 80%?

A. No.

Q. Does it not represent a very large majority?

A. Yes.

Q. Is that available?

A. Yes.

Q. How soon can you let us have that?

A. In three or four days.

Q. Will you get it together?

A. Yes.

[fol. 76] The Court: Gentlemen, three or four days; this is the 19th of March!

Question by Mr. Carney:

Q. Could you get it sooner?

A. I will do it as fast as possible.

Q. In this schedule here you have certificates and assignments. Do you know how many of these 4911 are certificates and how many are assignments?

A. I cannot tell exactly.

Q. You know there is a great deal of difference between their legal rights?

A. Yes.

Mr. Marbury: I object. He is not a lawyer.

Question by Mr. Carney:

Q. Can you get that data?

A. I can.

Q. Also the amount in certificates and amount in assignments?

(Note. Witness makes note, without answering.)

Mr. Carney: That's all.

(Testimony of witness Randall concluded.)

(Whereupon, Mr. Hennighausen offered in evidence "Plaintiff's Exhibit A," and said paper writing was duly admitted in evidence.)

Tuesday, March 20th, 1934.

Hearing in the above entitled cause was resumed on Tuesday, March 20th, 1934, at 10:25 A. M.

Present: Counsel for the respective parties.

Thereupon BLANCHARD RANDALL, JR., a witness heretofore produced, sworn and examined, was recalled and testified further as follows:

[fol. 77] Direct examination.

By the Court:

Q. Are these, Mr. Randall, the schedules Mr. Tucker has shown, the schedules which you prepared?

A. Yes, sir.

Q. Supposedly in response to their request yesterday?

A. Yes, sir; showing approximate breakdowns.

The Court: All right.

By Mr. Carney:

Q. Mr. Randall, yesterday you were requested to prepare and submit certain additional information. Have you done so?

A. Yes, sir; that is the original of those papers which you have.

Q. This was prepared by you or in your office?

A. It was prepared in the office under my direction.

Q. And is not on an accurate basis but on an approximate basis?

A. That is correct.

Mr. Carney: We offer this in evidence.

Mr. Tucker: We object, if the Court please. We think it has nothing to do with the question before us. It is just in line with our other objections.

The Court: Of course, I have not seen it. I do not know what it is. If it is just a schedule showing the break-up of the mortgages, I will admit it for what it is worth.

(Note.—Paper referred to was marked and filed in evidence as Plaintiff's Exhibit No. 3.)

Mr. Tucker: Note an exception.

By Mr. Carney:

Q. Mr. Randall, have you also brought with you a form——

The Court: It is a little broader than was asked for. The figures were not asked for the County.

Mr. Carney: I would like to have the county part stricken out, sir. As a matter of fact, it does not concern this issue. [fol. 78] The Court: Well, just as you like about that. He was not asked to bring in anything about the county.

Mr. Carney: Then may I exclude the portion which applies to the County, sir?

The Court: Yes, and they can offer it if they desire to.

By Mr. Carney:

Q. Mr. Randall, did you bring with you the form of the management agreement?

A. One for a corporation and one for an individual.

Q. The papers which you hand me are the management agreements used by the Mortgage Guarantee Company?

A. By the subsidiary, the Saratoga Building and Land Corporation.

Q. And there are two forms here, one to be executed by an individual owner and one by a corporate owner; is that correct?

A. That is right.

Q. And these forms are the only forms used by the subsidiary of the Mortgage Guarantee Company, to wit, the Saratoga Building and Land Corporation, in the management of properties taken over from mortgagors, on proper-

ties on which the Mortgage Guarantee Company or its clients hold mortgages?

A. Yes.

Mr. Carney: We offer these in evidence.
(Objected to; objection overruled; exception noted.)

(Note.—Papers referred to were thereupon marked and filed in evidence as Plaintiff's Exhibit No. 4 and Plaintiff's Exhibit No. 5.)

Q. You were also requested to bring with you a form of certificate used before you assigned interests in mortgages outright. Have you brought such a form with you?
A. Yes, sir.
Q. The paper which you hand me is such a form?
A. Formerly used.

Mr. Carney: We offer this in evidence.

(Objected to; objection overruled; exception noted.)

[fol. 79] (Note.—Paper referred to was thereupon marked and filed in evidence as Plaintiff's Exhibit No. 6.)

Q. Mr. Randall, on these schedules which you have produced I notice the words "Equity owned." I suppose you mean the Mortgage Company subsidiary. What company are you speaking of when you speak of the Mortgage Company subsidiary owning the equity?
A. I think those words mean Mortgage Company or subsidiary. The subsidiary would be the Saratoga Building and Land Corporation.
Q. That is the only company which you refer to in this schedule?
A. Yes.
Q. When you say managed by a mortgage company or subsidiary, what company do you refer to when you say "managed by mortgage company or subsidiary"?
A. The same Saratoga Building and Land Corporation.
Q. That is the only company referred to in this schedule, is that correct?
A. Yes.

The Court: As subsidiary.
The Witness: Yes, sir.

Q. What other subsidiaries does the Mortgage Guarantee Company have and of what use do you make of them?

Mr. Tucker: I object.

Mr. Carney: I will withdraw that question and put it this way:

Q. Isn't it true that the Mortgage Company has other subsidiaries in addition to the Saratoga Building and Land Corporation, and isn't it true they hold title to equities of some of these properties and/or manage these properties, or some of them?

(Question objected to; objection overruled; exception noted.)

A. There is no subsidiary, sir.

Q. Isn't it true that the First Management Corporation is a subsidiary of the Mortgage Guarantee Company?

[fol. 80] A. I don't know what you mean by subsidiary in that case. In our own estimation, it is not.

Q. What relation has the First Management Corporation to the Mortgage Guarantee Company, doesn't it have offices with the Mortgage Guarantee Company?

A. Yes.

Q. Wasn't it organized by the Mortgage Guarantee Company or the officers of the Mortgage Guarantee Company?

A. Yes.

Q. And doesn't it manage or hold title to either one or the other of a number of properties on which the Mortgage Guarantee Company at present holds mortgages, or its clients?

A. No, sir.

Q. That is not true?

A. No, sir.

Q. Doesn't the First Management Corporation handle a number of properties the same as the Saratoga Building and Land Corporation?

A. It has managed contracts.

Q. With whom?

A. With certain individual people.

Q. All properties which are mortgaged to the Mortgage Guarantee Company or on which clients of the Mortgage Guarantee Company by assignment hold mortgages; isn't that true?

A. That is substantially correct.

Mr. Tucker: What do you mean by "clients?"

Mr. Carney: Purchasers of mortgages or partial interests in mortgages. Mr. Randall understands what I mean. He says it is substantially correct.

Q. Why is it, in preparing this statement, you did not include in it, therefore, the properties under the control or management of the First Management Corporation?

A. Because the management of those properties is done by the Saratoga Building and Land Corporation and the profits, if any, occuring from that management are received and accounted for by the Saratoga Building and Land Corporation.

Q. As I understand it, then, you differentiate between a case where the Saratoga Building and Land Corporation manages the property, takes out its commissions and turns [fol. 81] over whatever is left to the Mortgage Guarantee Company, and a case where the First Management Corporation does the same thing, except instead of turning the balance back to the Mortgage Guarantee Company it turns the balance back to the owner of the redemption of equities; is that it?

A. No, sir, the First Management Company does not operate properties, the operation is operated by the Saratoga Building and Land Corporation.

Q. Then I understand you to say, the First Management Company is a subsidiary of the Saratoga Building and Land Corporation; is that correct?

A. No, sir; there is no stock connection between the two companies at all.

Q. What does the First Management Company get?

A. The First Management Company has certain contracts for the management of certain property. It turns over the actual operation of that to the Saratoga and it turns over any accruals or income resulting from it to the *Saratoga Building and Land Corporation.*

Q. In other words, as I understand your testimony, the First Management Corporation has contracts for the management of property; is that right?

A. That is right?

Q. It does not actually do anything except get the contract; the actual work under that contract is done by the

Saratoga Building and Land Corporation; is that correct?

A. Correct.

Q. And the actual profits from that are turned over to the Saratoga Building and Land Corporation?

A. That is correct.

Q. Yet in this statement you have not included any properties in which the First Management Company holds contracts?

A. I cannot be positive of that fact because I did not myself make up the schedule.

The Court: Do you think that is correct?

The Witness: I think it is correct, sir, but I am not positive of it.

[fol. 82] By Mr. Carney:

Q. You think what is correct?

A. That the properties managed by the First Management Company are not included in this schedule.

Q. Didn't you in the first part of your testimony tell me that the only subsidiary meant by this wording of the schedule was the Saratoga Building and Land Corporation?

A. The First Management Company is not a subsidiary.

Q. Who owns the stock of the First Management Corporation?

A. None is issued.

Q. Who incorporated the First Management Corporation?

A. A law firm, sir.

Q. What law firm?

A. I believe it was Semmes, Bowen and Semmes.

Q. Who are the officers of the First Management Corporation?

A. The only two I know of are the two people in the Saratoga organization.

Q. Who are they?

A. Miss Helen Watkins and I cannot be sure who the other one is? I think it is Mr. Loth.

Q. They are minor employees of the Saratoga Building and Land Corporation, is that correct?

A. Yes, sir.

Q. Do you have a Board of Directors?

A. No.

Q. How do you operate, who gives instructions and orders?

A. The contracts, when they have been obtained, are turned over to the Saratoga Company for management, and the Saratoga's officers give the orders.

Q. So that it really is the Saratoga Building and Land Corporation under a disguise, is that right?

A. Not within the contemplation of those words, sir.

Q. You explain it any way you want. Isn't the Saratoga Building and Land Corporation operating incognito?

A. No.

Q. It does not have any actual corporate existence, does it, of its own?

Mr. Thomas: Don't you think you are going pretty far [fol. 83] from base? You are talking about corporate existence.

Q. When was the First Management Corporation organized?

A. As far as I know, about last May or June.

Q. Now, without me having to draw it out of you, Mr. Randall——

The Court: I will not permit that kind of a question.

Mr. Carney: Strike that out.

Q. What other corporations of a similar nature does the Mortgage Guarantee Company have?

A. There is one over in Atlantic City.

Q. What is that?

A. The Eastern Shore Company.

Q. Operating the same way?

A. Similar to the operation described.

Q. Now, I ask you again, were there any other companies of a similar nature operating here in Baltimore City owned and controlled by the Mortgage Guarantee Company?

A. That Eastern Shore Company does not operate in Baltimore City.

Q. That is the only one you can think of?

A. Yes.

Q. Have you ever heard of a corporation known as the Druid Park Apartments Company?

A. Yes, sir.

Q. Who are the officers of that company?

A. I don't know, sir.

Q. Don't you know it is a company with a very similar set-up to the First Management Corporation?

A. No, sir.

Q. You do not? Isn't it true that they have been servicing in the same way the First Management Company does, a number of properties in Baltimore City on which the Mortgage Guarantee Company or its clients hold mortgages by assignments?

A. Isn't it true they do what?

Q. Do you understand the question?

A. No, sir, I do not.

[fol. 84] Q. To put the question specifically, doesn't the Druid Park Apartments Company service the Hilton Court and Stratford and Oakland Apartments?

A. I cannot tell you exactly about those three.

Q. Do you know who is the president of the Druid Park Apartments Company?

A. No, sir.

Q. You never heard of it? *A.* Don't you know the moving spirit in the matter and practically sole officer is Mr. Englar? Did you ever hear of that name before?

A. Yes.

Q. Who is Mr. Englar?

A. To the best of my knowledge, he is an officer of the Druid Park Apartments Company.

Q. You are positive of that?

The Court: Well, that is his belief.

Q. Don't you know that they also service the apartments on Reisterstown Road facing Druid Hill Park?

A. They own the equities in it.

Q. Weren't the equities transferred to it by the Mortgage Guarantee Company under foreclosure and wasn't the company organized by the Mortgage Guarantee Company for that purpose?

Mr. Tucker: You mean the Mortgage Guarantee Company was the trustee——

Mr. Carney: They foreclosed the second mortgage and then transferred the equity to the Druid Park Apartments, a dummy company the same as the other.

Mr. Marbury: Well, now, is that proper?
Mr. Carney: We are going to prove it.

Q. Is that correct, Mr. Randall?
A. Not as I know of.
Q. Isn't the Mortgage Guarantee Company or the Saratoga Building and Land Corporation at this time the owner of all of the stock of the Druid Park Apartments Company?
A. As far as I know, it is.
Q. And when did they acquire that stock?
A. To the best of my knowledge, it was about October, 1933.

[fol. 85] Q. So that the Mortgage Company or the Saratoga Building and Land Corporation is now the sole owner of the Druid Park Apartments Company; is that correct?
A. That is right.
Q. Did you include in this schedule the properties, the equities of which are vested in the Druid Park Apartments Company?
A. Yes, sir.
Q. You did?
A. Yes.
Q. You told me a minute ago in the first part of your testimony that the only subsidiary included was the Saratoga Building and Land Corporation?
A. The Saratoga Building and Land Corporation is managing those properties today and they are included in that schedule.
Q. Don't you know that the Druid Park Apartments Company has its signs all over them as big as life and no Saratoga Building and Land Corporation signs?
A. It is a matter of choice what signs you put up; good will.
Q. Does the Druid Park Apartments Company at this time have any officers?
A. To the best of my knowledge, I don't know who they are, if there are any.
Q. Do they have a board of directors?
A. Not that I know of, sir.
Q. Now, in all of these cases where the equity is owned by the Saratoga Building and Land Corporation, or in some roundabout way by the Druid Park Apartments Company the actual ownership, direction and control is vested

in the Mortgage Guarantee Company and its officers eventually; isn't that true?

A. Correct.

Q. Mr. Randall, are there any other companies the entire stock interest of which, or a substantial stock interest, is owned by the Druid Park Apartments Company, Saratoga Building and Land Corporation or Mortgage Guarantee Company?

A. The Wyman Park Apartments.

Q. Who owns the stock interest in that?

A. Mortgage Guarantee Company.

[fol. 86] Q. Own all the stock?

A. As far as I know, it is complete.

Q. And is that included in your list here?

A. Yes, sir.

Q. Who are the officers in that company?

A. I don't know.

Q. Do they have any?

A. Not that I know of.

Q. Mr. Randal, in whom is the control of the Guilford Realty Company lodged at this time?

A. I cannot answer that.

Q. Isn't it a fact it is lodged in the Mortgage Guarantee Company?

A. It is not, sir.

Q. Who are the officers of the Guilford Realty Company?

A. I know of only one, Colonel Ellis, president.

Q. He is an officer of the Mortgage Guarantee Company?

A. No.

Q. Was?

A. Prior to October or September, 1933.

Q. He has not been in office since that time?

A. No.

Q. Mr. Randall, can you tell me, if you know, and if not, how long it would take you to get the information as to what properties, I mean the aggregate and the number of mortgages, does the First Management Corporation hold contracts on?

A. I can find out. I can't tell you offhand.

Q. Would it be as much or as many as those which you

have listed here as being serviced by the Saratoga Building and Land Corporation?

A. My guess would be that the management of the properties number perhaps eight or ten, to an aggregate amount of $300,000 to $500,000.

Q. No more than that?

Q. And there are several mortgages which were previously withdrawn from the Mortgage Company's guarantee which were turned over for the servicing of the mortgages; that is, the collection of interest, but they are not property managements. I don't know how many of those there are or what they amount to, but it is not much.

[fol. 87] Mr. Tucker: You mean those are mortgages which the Mortgage Guarantee Company has nothing at all to do with?

The Witness: Has nothing at all to do with today.

By Mr. Carney:

Q. What other contracts is the First Management Corporation undertaking to perform at this time?

A. None except the servicing of such mortgages referred to in the previous question.

Q. Aren't they undertaking to collect ground rents and charge commissions upon the ground rents and so forth?

A. I cannot positively say whether they have such a contract on their books or not.

Q. You know, as a mater of fact they are collecting ground rents and they are charging commissions for that work, don't you?

A. I cannot tell you positively offhand whether they are or not.

Mr. Carney: I think that is all.

(Testimony of the witness concluded.)

Wednesday, March 21st, 1934.

Hearing in the above entitled cause was resumed on Wednesday, March 21st, 1934, at ten o'clock A. M.

Present: Counsel for the respective parties.

Thereupon Mr. Hennighausen on behalf of the Petitioners asked leave of Court to withdraw the demurrer of the Petitioners theretofore filed to the answer of the Respondents and to amend the Petitioners' original petition by making certain additions thereto.

Mr. Tucker: Of course, I should like the record to show that the application to amend the petition, after they have taken testimony by amendments that have been filed this [fol. 88] morning nunc pro tunc, is over the objection of the respondents in the case.

The Court: That is proper to put in the record. I will overrule the objection and permit them to make the amendment.

After recess (2 o'clock P. M.)

The Court: To make the record simple, see if I state it correctly: By leave of Court this morning the petitioners asked leave to amend their original petition, maintaining their original petition plus the amendment, and leave was so granted to do. To that, after the luncheon hour, the defendant desires to have his presently filed demurrer treated as a demurrer to that petition and disregard all previous pleadings on both sides. Is that correct?

Mr. Tucker: That is correct, but I think that results from the filing of an amended petition.

The Court: Mr. Marbury, do you want to be heard on the amendment?

Mr. Marbury: No, sir.

The Court: I overrule the demurrer, so as to get some action on it.

Mr. Tucker: Now, the demurrer being overruled, of course, without waiving the position of the demurrer, we now file an answer to the amended petition. I understand, if the Court please, with the exception of the fact that Mr. Randall wants to take the stand for just a moment to correct an error that was made by him in connection with the schedules that were filed, and also with respect to the First Management Corporation, that will conclude, as far as I know, all the testimony in the case.

The Court: Am I correct in having this on the record? It is understood and accepted as agreeable by both sides

[fol. 89] that all testimony heretofore taken in this case in advance of these amended pleadings, instead of being retaken, is considered as if taken subsequent to the filing of this petition as amended, and the answer thereto.

Mr. Hennighausen: That is agreeable to us.

Mr. Tucker: That is correct.

Thereupon BLANCHARD RANDALL, JR., a witness heretofore produced, sworn and examined, was recalled and testified further as follows:

Direct examination.

By Mr. Tucker:

Q. Mr. Randall, you have already been sworn. Yesterday you submitted a schedule showing mortgages in Baltimore City which had been assigned or participating certificates of fractional parts made by the Mortgage Guarantee Company. I understood you want to make some correction in that regard?

A. Not in respect to those sold in fractional parts, but in respect to those which were sold outright. Due to the haste in making up the schedule, one large mortgage was omitted and in the schedule it shows mortgages sold outright, so many in Baltimore City. Of the above mortgages there were managed by the Mortgage Company or its subsidiary, eighteen. That should read nineteen, and the amount, instead of $101,300, should be $296,300, adding one mortgage of $195,000, the property of which is managed by the Mortgage Company or its subsidiary.

Q. Now, you stated yesterday that properties that were managed by the First Management Corporation were not included in the number shown on that schedule?

A. That is correct.

Q. Will you tell us why that was?

A. The reason for that is, sir, that the First Manage-
[fol. 90] ment Company does not manage any property on which are mortgages covered in those schedules. The mortgages on those properties are withdrawn mortgages and the policy of guarantee in each case has been returned

to the Mortgage Guarantee Company, and while they were previously made by the Mortgage Guarantee Company, in many instances, I am not sure of all instances, at the present time there is no relationship between those mortgages and the Mortgage Guarantee Company.

Q. Of any description?

A. Of any description. The Management Company has managed those as a service to the holders of those mortgages.

Cross-examination.

By Mr. Carney:

Q. Mr. Randall, that mortgage of $195,000 is upon what property?

A. Upon the Iglehart Building, sir.

Q. Aren't you in error when you say the First Management Corporation has nothing to do with mortgages that are still under the control of the Mortgage Guarantee Company and its purchasers? I particularly have in mind one instance that I know of, a piece of property owned by a man by the name of Haskell Feldman on Arlington Avenue, a mortgage in the sum of $10,000, and one of my clients has a part in that mortgage and statements are being rendered regularly to Haskell Feldman by the First Management Corporation?

A. I think that is being managed by the Saratoga Building and Land Corporation and they are using First Management stationery merely as a matter of convenience.

Q. The statements go out on the stationery of the First Management Company?

A. But it is not on the First Management Company's books. It is to save money in the stationery.

Q. Have you included in these schedules at all anywhere the Wyman Park Apartments Company property?

A. Yes, sir; that is included in properties in the first list of those managed by the Mortgage Company or its subsidiary.

Q. As a matter of fact, that should be under the head [fol. 91] of "Equity owned," isn't that right, because actually the Mortgage Company now owns the equity in that property?

A. It is a separate corporation. The Mortgage Company owns all of the stock.

Q. It owns all of the stock of the Wyman's Park Apartments, isn't that true?

A. Yes.

Q. How large is that mortgage?

A. The amount shown in this schedule is only $6500.

Q. And how much is the actual amount?

A. The actual amount of the mortgage is $565,000.

Q. Why haven't you included the full amount?

A. Because the balance has been purchased by the Mortgage Company and is collateral for one of its loans. When the mortgage matured it was bought up under its guarantee by the Mortgage Company, with the exception of $6500 or thereabouts.

Q. But it was not sold the same as any other mortgage to a client, isn't that true?

A. No, sir; the schedule covers mortgages which are in the hands of clients today.

Q. Isn't that mortgage more yours than any you have sold, because it belongs to you outright and all you have done is pledge it for a loan; isn't that true?

A. We have pledged it for a loan.

Q. But you are the actual owner of the mortgage?

A. We own what we have purchased of it.

Q. So that really these schedules should be increased then, to the extent of $500,000; isn't that true?

A. As I understood these schedules, they were to be the amount of mortgages in the hands of investors.

Q. Now, adopting my theory as being correct—I do not say it is—but adopting my theory as being correct, it would result in the addition of $500,000 to the item marked "Of the above equity owned by Mortgage Company or subsidiary," and increasing that amount from one million, six hundred and thirty thousand and some odd amount to two millions, one hundred thousand; is that right?

A. Granting your premise, and also it would increase the total amount of mortgages outstanding in Baltimore [fol. 92] by about $565,000, the gross figure at the top of the page.

Q. Have you included in this statement anywhere the properties legal title to which are in the names of the Druid Park Apartments Company?

A. Yes, sir.

Q. Where are they included?

A. They are in those managed by the Mortgage Company or its subsidiary.

Q. Shoudn't they actually be under the heading "Equity owned" because doesn't the Mortgage Company through owning all of the stock of the Druid Park Apartments Company, actually own all of the equity of redemption in those properties?

A. If those which are included under the heading "Equity owned," by the Mortgage Company or its subsidiary, that is, where the actual property itself is owned in every case, the only instances I can recollect are the Wyman Park Apartments and the Druid Park Apartments, which have been included in this schedule under managed.

Q. How much in amount are the mortgages on the properties title to which are in the name of the Druid Park Apartments?

A. Outstanding in the hands of the public about $700,000.

Q. And how much otherwise?

A. I cannot tell you offhand.

Q. It runs over a million dollars, doesn't it?

A. No, sir.

Q. How much more than $700,000?

A. I don't want to guess, I don't know.

Q. Then, adopting my theory about the matter, for the sake of getting these schedules in shape, you should add $700,000 to the approximate figure of $2,100,000 that we have for equities owned by Mortgage Company or subsidiary; isn't that right?

A. Granting that, yes, sir, and reduces the amount that is managed by that amount.

Q. In other words, the managed amount goes down and the ownership amount goes up; is that right?

A. Yes.

Q. So that adopting that theory as being correct, you [fol. 93] have close to three million dollars worth of property in your name or in the name of your subsidiaries, $2,800,000 to be approximately accurate?

A. Admitting that theory; yes, sir.

Q. Now, are there any other properties in the name of any other corporations owned or controlled by the Mort-

gage Guarantee Company or any of its subsidiaries or any other company which you have organized, which are not included in these schedules?

A. Not that I know of.

Q. If there were, would you know?

A. I expect I would.

Mr. Carney: That is all.

Redirect examination.

By Mr. Tucker:

Q. Now, Mr. Randall, this heading under the schedules, "Of the Above Equity Owned by Mortgage Company or Subsidiaries," did you mean equity in the propery or equity in the mortgage?

A. Equity in the property.

Q. You mean that the equity in the property was owned either by the Mortgage Guarantee Company or by the Saratoga Building and Land Corporation?

A. That is correct. That is not the case in either the Wyman Park or the Druid Park Apartments.

Q. Now, the mortgage which Mr. Carney referred to as having a fractional interest therein, being owned by his client, was that mortgage included in those schedules?

A. To the best of my knowledge, yes, sir.

Mr. Tucker: I think that is all.

(Testimony of the witness concluded.)

(Argument to the Court resumed and concluded.)

[fol. 94] Copy of Exhibits Filed with Testimony Other Than Those Previously Set Out with Pleadings, or to be Omitted Under Stipulation of Counsel.

Note.—Copies of "Petitioners' Exhibit No. 1" (Mortgage) and "Petitioners' Exhibit No. 2" (Assignment) filed with original Petition, and "Petitioners' Exhibit A" (Letter of Mortgage Guarantee Company) and "Petitioners' Exhibit B" (Re-adjustment Plan of Mortgage Guarantee Company) filed with Petitioners' Amended Petition and which have hereinbefore been set out with their respective

pleadings, are not again set out with the testimony as it is deemed unnecessary to duplicate the Record in that regard. Reference, however, is hereby made to same.

There is also omitted from the Exhibits filed with the testimony "Plaintiffs' Exhibit No. 5," as it is a duplicate of "Plaintiffs' Exhibit No. 4" except that it is in form for execution by a corporation rather than an individual.

(See stipulation of counsel at end of the Record.)

Copy of Plaintiffs' Exhibit A

(Filed with Testimony.)

This assignment and agreement: Made and entered into this 18th day of February, in the year one thousand, nine hundred and thirty-one, by and between the Maryland Title Securities Corporation, a body corporate duly incorporated under the Laws of the State of Delaware, (hereinafter called "Corporation"), and The Equitable Trust Company, Trustee, a body corporate, duly incorporated under the Laws of the State of Maryland, (hereinafter called "Trustee");

Witnesseth: Whereas, Corporation by mesne assignments is the owner of a certain mortgage and the mortgage indebtedness secured thereby from Wirt W. Pendleton to The Maryland Title Guarantee Company, dated April [fol. 95] 27th, 1921, and duly recorded among the Land Records of Baltimore City in Liber S. C. L. No. 3728, folio 338, for the principal amount of Four Thousand, Five Hundred Dollars ($4,500.00), now reduced to Four Thousand, Two Hundred Dollars ($4,200.00), covering the property more particularly described therein; and

Whereas, Corporation is desirous of assigning undivided beneficial interests in said mortgage, and in the mortgage indebtedness secured thereby, in such manner as to secure protection to the assignees by vesting the legal title in a trustee who shall hold, manage and collect the same for the proportionate benefit of all such assignees; and

Whereas, the Trustee has consented to act as such trustee, and to give such assignees evidences of equitable ownership, as hereinafter provided:

Now, therefore, in consideration of the premises and the performance of the mutual agreements and covenants herein contained, the Corporation does hereby assign unto the Trustee, all of its right, title and interest in and to the mortgage hereinbefore referred to, on the principal sum of which there is now owing Four Thousand Two Hundred Dollars ($4,200.00) and also all its right, title and interest in the properties described in said mortgage and in the mortgage debt intended to be secured thereby.

To have and to hold, unto the Trustee and its successors in the trust for the use and benefit of the holders of the evidences of equitable ownership hereinbefore mentioned and hereinafter more particularly set forth, and more expressly, for the following purposes:

(1) To collect the mortgage interest, and, after deducting therefrom one-half of one per cent per annum of the principal amount of the mortgage indebtedness, to pay over their proportionate shares of the balance to the equitable owners.

(2) To collect the principal of said mortgage debt when and as the same may became due and payable and to pay their proportionate shares to the persons who shall be entitled to the same as equitable owners.

[fol. 96] (3) In its own name, to enforce all the covenants of the mortgage, including those for the payment of insurance premiums, taxes, water rent, assessments and other charges; to execute all necessary releases; and, in case of default, to exercise for the use of the equitable owners all the rights in law and in equity of a mortgage.

(4) And in case of any default by the mortgagor, to bring suit in its own name but for the use of the equitable owners, on the guaranty hereinafter set forth.

In order to evidence the interest of the several beneficiaries hereunder, the Trustee will issue and deliver assignments in the following form:

"Assignment No" "Mortgage No."

Partial Assignment of Mortgage by The Equitable Trust Company (of Baltimore) Trustee

The Equitable Trust Company (hereinafter called Trustee) hereby assigns to —— and his registered assigns

(hereinafter called Holder) an undivided equitable — shares equivalent to — Dollars ($——) in a first mortgage (and the debt of $—— thereby secured) from —— to —— dated the — day of —— 19—, and recorded among the —— Records of —— In Liber — No. — folio— Said mortgage debt bears interest at the rate of —% per annum, payable semiannually quarterly on the —— days of —— in each year; it matures on the — day of —— 19—; and is not subject to prepayment except as noted on the back hereof. It is further stated; (1) That said mortgage and debt have been assigned to the Trustee under an Agreement (duly recorded prior hereto among the —— Records of —— and made part hereof) between it and Maryland Title Securities Corporation, whereby the latter guarantees to the Trustee the performance by the mortgage debtor of the covenants and conditions of the mortgage: (2) That the title to the mortgaged property has been guaranted to the Trustee by The Maryland Title Guaran- [fol. 97] tee Company; and that the Trustee will maintain adequate insurance to cover any loss by fire.

The Trustee agrees: (1) That it will pay to the registered Holder as received by it his proportionate share of the mortgage debt at maturity upon surrender of this Assignment; and, meanwhile, his proportionate share of the mortgage interest, deducting, however, from the latter for its services so much as will leave the Holder a return of —% per annum net; (2) That it (the Trustee) will, in case of default by the mortgage debtor promptly take (for the benefit of the Holder and of all other owners of equitable interests in the Mortgage) such legal steps as may be necessary to enforce the covenants of the Mortgage and also the said guaranty of the Maryland Title Securities Corporation; and (3) That it (the Trustee) will enforce, if necessary, the policies of title and fire insurance.

It is agreed between the Trustee and the Holder hereof; (1) That this Assignment does not create (nor does the Trustee hereby assume) any indebtedness; nor does it assume any duties except as herein specified; (2) That the interest of the Holder in said mortgage and hereunder shall be assignable only on the books of the Trustee; and (3) That the Trustee shall for the distribution of interest and other purposes be entitled to treat the registered owner of the mortgage share evidenced hereby, as the true owner thereof; and that all notices duly mailed to the registered

holder at his address on the books of the Trustee shall be binding on him and all other persons whatsoever.

Witness the signature of said body corporate, Trustee, by the hand of its Vice-President, and its corporate seal hereunto affixed this — day of —— in the year nineteen hundred and ——.

The Equitable Trust Company, Trustee, by —— ——, Vice-President; —— —— Ass't. Secretary.

[fol. 98] Contemporaneously herewith the Corporation has caused to be assigned to the Trustee, a fire insurance policy or policies covering the mortgaged premises in an amount sufficient to protect the principal of said mortgage, the premiums on said insurance policy or policies having been paid or agreed to be paid by the mortgagor as set forth in said mortgage. The Corporation *als* contemporaneously herewith has furnished to the Trustee a certificate showing the guarantee by The Maryland Title Guarantee Company that the title to the property described in the mortgage aforesaid, is good and merchantable.

It is further agreed that The Corporation shall and does hereby guarantee to the Trustee the punctual payment by the mortgagor of the mortgage debt and interest; and also the performance by the mortgagor of all the covenants and conditions of the mortgage.

Witness, the signature of the Maryland Title Securities Corporation by the hand of Charles H. Buck, its Vice-President and its corporate seal hereto affixed; witness also the signature of The Equitable Trust Company, Trustee, by the hand of Sifford Pearre, its Vice-President, and its corporate seal hereto affixed.

Maryland Title Securities Corporation, by (Signed) Chas. H. Buck, Vice-President.

Witness: (Signed) Elmer M. Harper.

The Equitable Trust Company, Trustee, by (Signed) Sifford Pearre, Vice-President.

Witness: (Signed) Elmer M. Harper.

[fol. 99] STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify, that on this 18th day of February, in the year one thousand, nine hundred and thirty-one, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally

appeared Charles H. Buck, the Vice-President of the Maryland Title Securities Corporation, and he acknowledged the aforegoing Assignment and Agreement to be the act of said body corporate; at the same time also appeared Sifford Pearre the Vice-President of The Equitable Trust Company, Trustee, and he acknowledged the aforegoing Assignment and Agreement to be the act of said body corporate as such Trustee.

As witness, my hand and notarial seal.

Elmer M. Harper, Notary Public.

COPY OF PLAINTIFFS' EXHIBIT No. 2

(Filed with Testimony)

Senate of Maryland

No. 68

Mr. Altfeld—Judicial Proceedings

By the Senate, December 5, 1933

Introduced, read first time and referred to the Committee on Judicial Proceedings.

By order,

E. R. Crothers, Secretary.

A Bill entitled an Act to add seven new sections to Article 66 of the Annotated Code of Maryland (1924 Edition), title "Mortgages," said new sections to be known as Sections 30A to 30G, inclusive and to follow immediately after Section 30 of said Article, relating to foreclosure of Mort- [fol. 100] gages and actions for judgments on bonds secured by mortgages.

Whereas, a serious public emergency, affecting and threatening the welfare, comfort and safety of the people of the State and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the State and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists; and,

Whereas, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until June first, nineteen hundred thirty-five, is hereby declared as a matter of legislative determination, therefore

Section 1. Be it enacted by the General Assembly of Maryland, That seven new sections be and they are hereby added to Article 66 of the Annotated Code of Maryland (1924 Edition), title "Mortgages," said new sections to be known as Sections 30A to 30G, inclusive, to follow immediately after Section 30 of said Article and to read as follows:

30A. Foreclosure for principal defaults suspended. During the period of the emergency as defined in Section 30G, and notwithstanding any inconsistent provisions of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property under this Article or any other public general or local law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment of principal secured by such mortgage, although the payment of such principal or installment of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment of principal, and any grace period therein specified shall have expired, [fol. 101] then the rights and remedies of the holder of the mortgage shall not be affected by this Act.

30B. Actions on bonds for principal defaults suspended. No action shall be maintainable or judgment shall be entered during such emergency, upon any loan, indebtedness, bond, extension agreement, collateral bond, or other evidence of indebtedness or liability, whether or not such indebtedness or liability shall have been thereafter reduced, extended, or modified, if the indebtedness originated or was originally contracted for simultaneously with such mortgage and is secured solely by such mortgage, or upon any guaranty of payment of the principal or installment of principal of any mortgage within the scope of Section 30A or upon a guaranty of any obligation secured by such mort-

gage, so long as no action or proceeding shall be maintainable to foreclose such mortgage. No action shall be maintainable or judgment be entered during such emergency upon any guaranty of payment of any share or part of any bond and/or mortgage or group of bonds and/or mortgages represented by a certificate, bond, debenture or other instrument, nor upon any note, bond, debenture or other instrument being part of a series issued against, or secured by the deposit of a bond and/or mortgage or a group of bonds and/or mortgages so long as interest at the rate prescribed shall be paid upon any such certificate, note, bond, debenture or other instrument. The liability of any endorser, guarantor of, or surety for any such liability shall not be discharged by reason of the failure of the holder to demand payment of any such indebtedness or liability, or by reason of any failure to give notice of nonpayment, or by reason of any failure to bring any action or proceeding thereon during the emergency.

30C. Notice of application. Notwithstanding the foregoing provisions, any person who would otherwise have the right to foreclose a mortgage, shall have the right to make an application to any court in which such foreclosure action might be brought upon fifteen days notice, served personally, or in such manner as the court may direct to the last record owner of the mortgaged property, and if upon such application it shall appear to the satisfaction of the court that the mortgaged property during the six [fol. 102] months prior to the application shall have produced a surplus over and above the taxes, interest and all other carrying charges, then the court may make an order directing the payment of such surplus or such part thereof as the court may determine to the mortgagee to apply toward the reduction of any past due principal. In the event of default in making of such payment for thirty days after service of a copy thereof with notice of entry thereof, then and in such event the applicant may maintain an action to foreclose such mortgage. In any such proceeding the court may enter an order permitting foreclosure without other proof if the owner of the property shall fail to make available for inspection by the mortgagee and the court all records and data available as to the income and disbursements, or if the owner shall fail to produce adequate records or data of income and disbursements.

This section shall not apply to properties used or intended to be used for farming purposes or dwellings occupied by the owner or by the owner in conjunction with not more than one other family.

30D. Waiver against public policy. Any covenant or agreement or understanding in or in connection with or collateral to any mortgage whereby a mortgagor waives or agrees to waive the protection intended to be afforded to him by Sections 30 and 30B, shall be deemed to be void as against the public policy and be wholly unenforceable.

30E. Application to pending actions. Sections 30A, 30B, and 30D shall apply to any action or proceeding heretofore instituted for the foreclosure of a mortgage within the scope of this Act unless the same has proceeded to final judgment directing the sale of the mortgaged premises, and any such action shall be dismissed upon payment by any defendant to the plaintiff of taxable costs and the remedying of any default other than the payment of principal or any installment of principal within thirty days after this Act takes effect, but otherwise such action or proceeding may continue.

30F. Statute of limitations not to run during emergency. Any action or proceeding within the scope of this Act, [fol. 103] which would have been maintainable at any time during the period of the emergency, shall not be barred by any provision of Article 57 of the Code of Public General Laws during a period of one year after the termination of the emergency. This section shall not be construed to shorten the period within which any such action may be commenced.

30G. Mortgages not effected. The provisions of Sections 30A, 30B, 30C, 30D, 30E and 30F shall not apply to any mortgage held by a savings and loan association, payable in weekly or in monthly installments over a period of more than ten years from the time of the making of the loan, nor to any mortgage dated on or after November first, nineteen hundred thirty-three, nor to any obligations in connection with or secured by any such mortgages. The period of the emergency shall be from the date this Act takes effect until June first, nineteen hundred and thirty-five.

Sec. 2. And be it further enacted, That if any section, part or provision of this Act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part thereof.

Sec. 3. And be it further enacted, That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

[fol. 104] COPY OF DEFENDANTS' EXHIBIT X

(Filed with Testimony)

Certificates and Assignments

	Number of mortgages	Number of certificates and assignments	Investors	Amt.	Average
Baltimore City.....	190	4911	2300	$5,815,388.50	$1184
Maryland Counties..	138	1440	1358	1,721,025.00	1195
Mortgages outright:					
Baltimore City.....	147			951,515.87	
Maryland Counties..	158			486,460.00	

COPY OF PLAINTIFF'S EXHIBIT No. 3

(Filed with Testimony)

Schedule of Certificates and Assignments and Outright Mtges.

	No. of mtges.	Approximate No. of certificates	Approx. No. of assign.	No. of investors	Amt. of mtges.
Mtges. sold on certificate or assignment basis— Baltimore City.....	190	600	4311	2300	5,815,588.50
Of the above Equity owned by Mtge. Co. of Subsidiary.....	58		1479	1416	1,630,577.50
Managed by Mtges. Co. of Subsidiary.....	42		1052	986	1,285,725.00

Schedule of Certificates and Assignments and Outright Mtges.

Mtges. sold outright	No. of Mtges.	Amount
Baltimore City.....	147	951,515.67
Of the above Equity owned by Mtges. Co. of Subsidiary.....	25	82,490.87
Managed by Mtges. Co. or subsidiary.....	18	101,300.00

[fol. 105] COPY OF PLAINTIFF'S EXHIBIT NO. 4

(Filed with Testimony)

Know all men by these presents, That the undersigned, ——, do hereby constitute and appoint The Saratoga Building and Land Corporation, a Maryland corporation, my/our true and lawful agent for the following purposes:

1. To take possession of ——, and to ask, collect, receive and sue for any rents, profits or income issuing out of said property.

2. To undertake the general management of said property, to negotiate and effect long or short-term leases thereof or of any part or portions thereof, to make repairs thereto and to recondition and/or reconstruct or remodel the same or any part thereof.

3. To purchase such materials and supplies and to hire such clerks, mechanics, janitors, firemen, workmen and others as in its opinion may be reasonably necessary to operate to the best advantage and make tenantable the said property or any part thereof.

4. To apply the net operating income from said property to the payment of taxes, water rents, special assessments and municipal charges against the same and to the payment of mortgages and mortgage interest thereon and to pay over any surplus to the undersigned owner or hold the same for —— account.

5. The said The Saratoga Building and Land Corporation shall be entitled to receive and deduct as compensation for its services hereunder, a commission of 5% of the gross income collected by it, and shall not be held liable for mismanagement, for mistakes of judgment or for any losses resulting from its management unless arising from gross negligence on its part, and it shall generally have power to do, execute and perform any other acts, matters or things whatsoever which in its opinion ought to be done, executed [fol. 106] or performed in or about the premises in furtherance of its management of said property for the best interests of all concerned as fully and completely as could be done by the undersigned personally, and the undersigned do —— hereby ratify and confirm all that the said The

Saratoga Building and Land Corporation shall do or cause to be done by virtue of this authority.

In witness whereof, I/we have hereunto set my/our hand and seal this —— day of —— in the year 193-.

—— —— (Seal.), —— —— (Seal.).

Witness: —— ——.

STATE OF MARYLAND,
City of Baltimore, ss:

I hereby certify, That on this — day of ——, in the year Nineteen Hundred and Thirty —, before me, the subscriber, a notary public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared ——, who signed the aforegoing Management Agency Contract or Power of Attorney, and acknowledged the same to be —— act.

Witness my hand and notarial seal.

—— ——, Notary Public.

The above undertaking is hereby accepted.

The Saratoga Building and Land Corporation, by
—— ——, Vice-President.

(Here follows Exhibit 6, side folios 107-110)

Copy of Plaintiffs' Exhibit No. 6
(Filed with Testimony)

MORTGAGE NO. CERTIFICATE NO.

INTEREST PERIODS DATE — — —

YIELD % AMOUNT

FIRST MORTGAGE CERTIFICATE

PRINCIPAL AND INTEREST GUARANTEED BY

MORTGAGE GUARANTEE COMPANY

BALTIMORE, MARYLAND

The Mortgage Guarantee Company, hereinafter called "the Company," hereby certifies that it has received from

the sum of

Dollars for the purchase of, and hereby assigns to the purchaser, an undivided share equal to that amount, in the first mortgage made by

to the Mortgage Guarantee Company, for $ *dated*

due *and recorded among the* *Records of Baltimore*

. . . . . in Liber . . . No. . . . folio *covering the fee simple property*

. . . . . .

The mortgage referred to is held by the Company as depositary and agent for the purchasers of such certificates which shall never aggregate more than the amount of principal remaining unpaid on said mortgage, upon the following terms and conditions, which are agreed to by the purchaser of this certificate.

1. The Company holds and shall continue to hold said mortgage, and the other instruments and evidences of title relating thereto, for the benefit of the purchaser and any other persons interested therein, and shall as agent for the purchaser and any other persons interested therein collect the interest and principal of said mortgage when due.

2. The Company upon the receipt of the interest and principal of said mortgage shall distribute the same pro rata among the persons entitled thereto. The purchaser of this certificate to be entitled to receive of said interest on said mortgage, interest at the rate of five and one-half per cent., the balance of the mortgage interest to be retained by the Company in payment of its services hereunder.

3. The Company shall have full power to take any action it may deem necessary to enforce the provisions of said mortgage and shall have power to release the same upon payment of the mortgage debt holding the same subject to the order of the certificate owners.

4. The Company may for its own corporate account be the holder or pledgee of similar shares in said mortgage.

5. The Company may take up and cancel this certificate at any time on thirty days notice in writing to the purchaser and payment at its offices designated in such notice of the amount then owing to the purchaser for principal and interest, provided default shall have occurred on the mortgage.

GUARANTEE *The Company hereby guarantees to the owner of this certificate the payment of the specified interest when due as well as payment of the principal, but the Company at its option shall be entitled to a period of nine months after the maturity of the mortgage in which to collect the principal, upon making regular payments of interest in the meanwhile.*

MORTGAGE GUARANTEE COMPANY

By

Vice-President.

. . . . . .

Treasurer

12

(1) _____ (2) _____ SEAL

(3) _____ (4) _____ SEAL

FIRST MORTGAGE CERTIFICATE

PRINCIPAL AND INTEREST GUARANTEED

MORTGAGE GUARANTEE COMPANY

BALTIMORE, MARYLAND

AMOUNT

CERTIFICATE No

MATURITY

INTEREST DATES

CERTIFICATE OF TITLE GUARANTEE

THE TITLE GUARANTEE AND TRUST COMPANY OF BALTIMORE, MARYLAND, HEREBY CERTIFIES THAT IT HAS EXAMINED AND GUARANTEED TO THE MORTGAGE GUARANTEE COMPANY THE TITLE TO THE PROPERTY DESCRIBED IN THE MORTGAGE REFERRED TO IN THIS CERTIFICATE.

VICE-PRESIDENT

[fol. 111] The Daily Record, Baltimore, Friday, March 23, 1934

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

MARY E. MATTHEWS and JOHN MATTHEWS

vs.

WALTER H. WORNER

Frederick H. Hennighausen and J. Calvin Carney for petitioners.

Clarence A. Tucker, James Thomas and William L. Marbury, Jr., for Mortgage Guaranty Company and the United States Mortgage Company, intervening respondents.

Act of Special Session Maryland Legislature of 1933, Ch. 56 (moratorium on mortgage foreclosure by consent decree under Act of 1825 and decision of Richards vs. Owings, 86 Md.), held unconstitutional, as impairing obligation of contract, and as arbitrary classification, unreasonable in character.

OPINION

EUGENE O'DUNNE, J. (orally):

Gentlemen, we are now at the afternoon of March 21st, which only leaves us, roughly speaking, about ten days before the opening of the April Term of the Court of Appeals. We have had a number of adjourned sessions of the hearing of this case, partly occupied by law arguments, and partly reforming and considering pleadings, partly in the taking of testimony, and in the adjourned hearings of the taking of testimony, and it follows that, with all of those numerous sessions, and with a considerable volume of other classes of business intervening between sessions, I have necessarily taken from session to session a good many different trial notes of the work on each particular [fol. 112] day, part of which were devoted to this case.

From my own point of view, it would be more satisfactory, with such pride as a judge might justly take in his work, to now adjourn the matter and attempt to put these notes together in some kind of respectable sequence, with an attempt to comment on, and *and* possibly analyze, the

great variety of decisions that have been called to the Court's attention in some of the early days of argument, and in the very comprehensive briefs that have been filed in this case. I am deterred from doing that because of the flow of time. The result of so doing would probably be to delay you until such close proximity of the opening of the April Term of the Court of Appeals that the case could not be readily gotten down there.

I think there is a question of sufficient importance involved in a law of this kind, as applied to the facts to which it relates and the somewhat far-reaching possibilities of its construction, as to warrant an appeal; I may even say to almost make an appeal more or less mandatory. It would certainly be of a good deal of guidance to this and the other Equity Court if an early decision of the Court of Appeals could be had for our guidance as to what to do in these applications for foreclosures of what we have, for lack of a shorter term or better term, called "split mortgages."

There is not much use of my undertaking to comment on the long line of moratorium legislation. There is a collection of all the cases in what is called autumn number of 1933 of "Case and Comment," in an article entitled "Emergency Moratorium Laws," written by Mr. Kimbrough, of the New York and Kentucky Bars. It would serve no useful purpose to have me comment on the cases. You gentlemen have read them. A great many of them are cited in your briefs. Legislative Assemblies, like manufacturing plants, are rapidly turning out new styles of moratoria. New York is now showing a 1934 model, unlike anything that has preceded it. Increased horse power, extended wheel base, stream line entirely changed; designed to run forward or backward, with equal facility and speed. It has just withstood all the laboratory tests, and successfully performed before a jury of experts, [fol. 113] and received the signal decoration of the Iron Cross from the Court of Appeals of New York. While the opinion was handed down at Albany only yesterday, legal news service is so swift and accurate that I was able to read the text, in its entirety, this morning before the final argument here. The trial Court held the New York Moratorium Act all right. The Appellate Division, unanimously, thought it all wrong. The Court of Appeals, in

unanimous opinion, found all the Judges in Appellate Division to be all wrong. Hence I think the Act has justly earned the right to be called a "sport model." As the opinion runs from 6,000 to 7,000 words, I can make only a brief comment on it now. The Act there under consideration is entirely unlike the 1933 Maryland model. It was designed for split mortgages of title mortgage and guarantee companies, in liquidation. Except for the deference an inferior tribunal owes a superior (even in a foreign jurisdiction), I would say that the impression left on my mind, from a first, and necessarily hurried, reading of it, that the New York Court of Appeals holds that it does not violate Sec. 10, Art. 1, of the Federal provision against State impairment of contract, and further that if the statute does impair the obligation of contract, the impairment is not very serious, nor is the injury from impairment permanent in character, and that the emergency is so great, one ought to be satisfied to submit to a little impairment without grumbling; and that a little later in life it will not be necessary to impair it any further, or to continue the impairment any longer.

It is more subtlely and artfully put by the New York Court of Appeals as follows:

"An individual may not justly complain of a reasonable legislative invasion of his usual rights, or a reasonable legislative restriction on his usual liberty for the purpose of averting an immediate danger which threatens the safety and welfare of the community. * * *

"It gives, indeed, to creditors of a group a remedy which they did not have before; it deprives no one of a remedy which he would use for his legitimate benefit or without injury to others.

"Impairment of the obligation of contract to that ex- [fol. 114] tent and under analogous safeguards are not without precedent even in normal conditions. * * *

"True, when normal conditions are restored, when strict enforcement of the obligations of mortgage investment no longer constitute an immediate danger to the vital interests of the community further operation of the statute may be unreasonable."

The last paragraph of the opinion concludes as follows:

"We find that economic conditions create an immediate danger to the economic welfare and the vital interests of

the community. We find that the Legislature in the exercise of its reserve power has adopted a remedy which is reasonably calculated to meet such conditions. No impairment of contract which results will substantially injure any person.

"The statute merely furnishes a shield against unreasonable attacks on the vital interests of the community, and an additional remedy for enforcement of obligations in manner fair to all." Schackno case (Title and Mortgage Guarantee Co. of Buffalo), Opinion by Lehman, J. (Albany, March 20, 1934).

The particular case under the law with which we are dealing, as Mr. Hennighausen has just said in his last argument, is entirely unlike any I find in this compilation, and in the commentary on the compilation, and unlike any of the ones discussed in the Minnesota moratorium case; and wholly unlike the New York law sustained at Albany only yesterday. It is a peculiar statute, and possibly one justly characterized by Mr. Hennighausen as a moratorium, not for the debtor, but for a creditor who is a 75 per cent creditor, or a 75 per cent interest of creditors against 25 per cent interest of creditors, inter partes, so to speak, to protect a majority of creditors against minority creditors is one way of looking at it.

As I get it from the papers, the instant case is a $3,000 mortgage of July 30, 1925, in a small piece of property which has been described in the evidence as located at 1339 Patapsco avenue, in which the petitioners own a $500 interest out of an original $3,000 mortgage, which I think [fol. 115] the evidence shows has been reduced by $50 to $2,950. But for practical purposes we will use the original figures. The original $3,000 mortgage with a minority of $500, which is a sixth, held by petitioners, who ask to foreclose under the ruling of the Court of Appeals, in the case of Richardson vs. Owings, 86 Md. and as against that we are confronted in the pleadings with the provision of Chapter 56 of the Special Session of the Maryland Legislature of 1933, which, in effect, says the State is in a state of emergency, and as such, the provisions of the Act of 1825, known as the consent to sell and decree of consent, are not to be invoked by the holders of mortgages whose holding is less than 25 per cent interest in the whole.

The constitutionality of that Act is challenged in the amended petition as violating Section 10 of Article 1, the inhibition on the State to impair the obligation of contract, and I think also the due process of law and equal rights protection, and so forth.

Now, I say the best I can do for you at this time is to explain to you the process of reasoning by which I reach a conclusion, disjointed as it may sound, from my trial notes that I have before me, in my attempt to weave them together the best I can, under these conditions.

I have read with care and some concentration the majority opinion in the Minnesota moratorium case of Blaisdell, and when I arrived at its legal destination, I had a feeling that the route was long and tortious, and not free from occasional jolts that were somewhat discomforting. The train was powerful and moved swiftly and landed you safely at its original objective. Traveling later with the minority under the direction of Mr. Justice Sutherland, the trip seemed more delightful, the roadbed smoother, the scenery more pleasing and the points of historic interest more entertaining. While the terminus is still known as "Arcadia," it may some day be taken over by the Government as a legalized terminus.

Nowhere are the law and history either better or more succinctly stated than in the concurring opinion of Judge Digges of our Court of Appeals in Kenly vs. Huntington Building Association [The Daily Record, January 25, 1934] [fol. 116] an opinion joined in by Judges Parke and Sloan, concurring with Bond, C. J., who wrote the opinion for the Court. As that extract has just been read, I need not repeat it here. I refer particularly to column 5 of The Daily Record print of the date just given.

For which reason I am of the opinion that Chapter 56 of the Special Session of 1933 is unconstitutional, both as impairing the obligation of contract, and as class legislation of an arbitrary and illegal character. Holders of less than 25 per cent interest in mortgage securities cannot be denied the rights of foreclosure by consent decree under the Act of 1825, which right is stipulated for in the mortgage under which they bought and is one of the rights for which they paid. It is a right recognized in Richardson vs. Owings in 86 Md. 663. They canot be deprived of this right under the guise of "police power" and emergency

fiat, because it is now found that the clause, so customary in bond indenture restricting rights of 25 per cent minority action, was either inadvertently omitted from these mortgages, or deliberately omitted, so as to boost the sale price in the commercial vending of "split mortgages" as a matter of wise business policy.

I am not insensible to the argument, nor do I wholly fail to appreciate the distinction between the legislative right to repeal or suspend a mere procedural right, without impairing the obligation of contract as prohibited by the Federal provision. But where the procedural right is so intimately interwoven with the contractual right, as to be its Siamese twin, you cannot sever the one without jeopardizing the life of the other.

Mr. Thomas, with great learning and deep research, has made an exhaustive presentation of the history of mortgage foreclosure from early English history to the present. He concludes that two forms of mortgage foreclosure (other than the only form used in Baltimore for over a hundred years (viz. consent decree to sale)) are still theoretically open to holders of split mortgages owning less than 25 per cent of the whole. (Strict foreclosure and foreclosure by formal proceeding.) I cannot present the history and development of this thought in any original way to equal his interesting and learned sketch of it. Therefore, I cull an extract from his brief dealing with that [fol. 117] question. If these oral remarks are to be transcribed, in event of appeal which I assume will be promptly prosecuted to the April Term, I direct the stenographer to here insert the page from his brief which is as follows [Extract from Thomas brief]:

"One of the striking features of a mortgage in the State of Maryland is the number and diversity of the remedies afforded for the collection of the mortgage debt. Equity alone (in addition to the mortgagee's rights at law) affords five remedies for the foreclosure of the mortgage, i. e.:

"(a) Strict foreclosure, (b) Foreclosure by formal proceeding, (c) Foreclosure under a power to sell, (d) Foreclosure under an assent to a decree (local to Baltimore City) and (e) Sale upon breach of condition or happening of future event.

"(a) Strict foreclosure. For a discussion of this proceeding see Venable Syllabus on Law of Real Estate, Sec-

tion 177, et seq. and cases cited; Miller on Equity Procedure, Sections 445, 446.

"This, practically speaking, was the only remedy afforded in Maryland until 1785, although before that time in England, and to a limited extent in Maryland, there had been inserted in mortgages a power to sell. The English Courts recognized and enforced these powers. There seemed to be some doubt as to their validity in Maryland. Charles vs. Clagett, 3 Md. 82, 96.

"The principal feature of this proceeding was, that the decree provided that the Equity of Redemption would be forever foreclosed, if the mortgage debt was not paid by a day fixed in the decree. The effect of this was to extend the time for redemption and if the mortgagor failed to make payment within this extended time, the mortgaged property became the property of the mortgagee absolutely. This method of proceeding was liable to several objections and in an effort to meet them the Act of 1785, Chapter 72, was passed, authorizing Courts of equity in foreclosure proceedings to pass decree for the sale of mortgaged property.

"Practice under this Act and the amendments thereto gave rise to the method known as

[fol. 118] "(b) Foreclosure by formal proceedings. One of the objections to strict foreclosure was that the whole mortgaged estate became the property of the mortgagee absolutely, when a portion of it, if sold, might be sufficient to pay the mortgage debt, and the statutes giving Courts of equity the right to decree a sale upon any bill filed to foreclose a mortgage were designed to meet this objection. The Act, now codified as Section 232, Article 16, Maryland Code, did not abrogate the pre-existing remedy by strict foreclosure but merely gave an additional remedy. Andrews vs. Scotton, 2 Bland 629; Hogan vs. McMahon, 115 Md. 204.

"As, in practice, Courts have generally decreed a sale on foreclosure proceedings, it has been said that strict foreclosure has been practically supplanted. Hanover Fire Insurance Company vs. Brown, 76 Md. 64. This is true, but the remedy of strict foreclosure is in no sense abrogated. Venable, Syllabus on Law of Real Estate, Section 178.

"Foreclosure by formal proceedings is not a foreclosure under a power to sell or an assent to a decree. The power to foreclose after default is one of the ordinary powers of

the Court of Chancery, existing independently of any consent of the mortgagor or of the provisions of the mortgage. Venable, Syllabus on Law of Real Estate, Section 214. The proceedings for such foreclosure are in conformity with the regular pleadings and practice in equity and are commenced with the filing of a bill to foreclosure. The decree directs that unless the mortgage debt with interest thereon be paid within a time stated in the decree (a period for the exercise of the right of redemption) that the mortgaged property be sold. Code, Article 16, Section 232, further authorizes the Court, upon motion of the plaintiff, to enter a decree in personam against the mortgagor or other party to the suit, who is liable for the payment thereof, for the unsatisfied residue of the mortgage debt, after crediting thereon the proceeds from the sale, provided the mortgagee would be entitled to maintain an action at law upon the covenants contained in said mortgage.

"While the remedies afforded under strict foreclosure or foreclosure by formal proceedings seemed adequate [fol. 119] to meet every situation, mortgagees still exerted pressure on the Legislature and the Courts to provide them with more speedy remedies, and as the insertion of a power of sale in mortgages had become prevalent, but as stated in Charles vs. Clagett, 3 Md. 82, 96, "doubts were entertained as to the validity of sales under powers contained in mortgages unless made with the concurrence of the mortgagor or the sanction of a Court of equity. * * * some such consideration induced the Legislature to pass the Act of 1825," out of which grew the remedy now known as

"(c) Foreclosure of mortgages under power of sale. Without entering into a detailed discussion of the earlier legislation, its application and objects, for which see Miller on Equity, Section 452, et seq., and Venable, Syllabus on Law of Real Estate, Section 179 et seq., and Section 220 et seq., this legislation was codified in the Code of 1860, Article 64, as Section 5 and now appears as Code, Article 66, Section 6, et seq. The purpose of the legislation was to provide a more expeditious method of enforcing mortgages than the formal proceedings by bill in equity. The statutes were not intended to confer a new or special jurisdiction on Courts of equity but merely to regulate and perfect the method of proceeding where there was a power to sell in the mortgage. Venable, Syllabus on Law of Real Estate,

Sections 179, 220. The Acts are state-wide in this application and expressly provide that the power recognized therein is divisible, but as stated before, they relate only to the remedy. They "give no new jurisdiction but only prescribe a summary mode for the exercise of jurisdiction over the subject matter, of which the Court had full and ample cognizance, independent of the statute provision." Cockey vs. Cole, 28 Md. 276, 284. By Chapter 57, Acts of Special Session 1933, the pursuit of this remedy by the holder of less than 25 per cent. of the mortgage debt, is suspended during the period of the emergency, except as provided therein.

"In the meantime special statutory provision had been made for the sale of mortgaged properties in Baltimore City, and the proceeding, first authorized by Chapter 181 of the Acts of 1833, and now known as

[fol. 120] "(d) Foreclosure under an assent to a decree, became widely used. This proceeding, it was also held, did not confer a special jurisdiction and it has been uniformly regarded by the Court of Appeals of Maryland as providing a summary remedy for the benefit of mortgagees. Eichelberg vs. Harrison, 3 Md. Ch. 39, 41; Cronise vs. Clark, 4 Md. Ch. 403, 408; Kenley vs. Weirman, 78 Md. 302. For a further discussion see Miller on Equity, Section 474; Venable, Syllabus Law on Real Estate, Section 222 et seq. It was the purpose of Chapter 56 of the Acts of Special Session 1933 to guard the mortgage investment against the precipitate ex parte action of a small investor, by suspending the right of such investor to exercise this remedy during the period of the emergency limited in the Act, unless he secured the consent or concurrence of at least 25 per cent. of the record holders of the entire mortgage debt.

"It is only necessary to refer briefly to

"(e) Sale upon breach of condition or happening of future event. As heretofore stated, before the passage of the Act of 1785, Chapter 72, there had arisen in England and America the practice of inserting in mortgages what is called a power to sell. Courts of equity in England recognized these powers. The great objection to them, raised in the United States, was that they committed a power to the

mortgagee which was not compatible with his relation to the mortgagor. To meet this objection the mortgagor conveyed the property intended to secure the debt not to the lender but to some third person and empowered him to sell on default, in other words, created a deed of trust to secure the debt. These deeds of trust, now used in Maryland and neighboring States, partake of many forms. The obligation secured thereby is always the mortgage debt. It may, but is not necessarily, represented by a mortgage note or mortgage bond, or in the event that it is desired to split up the mortgage debt, notes or bonds in number and amount desired. The mortgage or deed of trust may convey fee or leasehold property or may convey a mortgage or mortgages. Where a number of mortgages are conveyed by a deed as security for fractional interests therein, the evidences of the mortgage debt are often described as Mortgage Certificates or First Mortgage Certificates, each Cer- [fol. 121] tificate calling for a fractional interest in the mortgages held by the Trustee as security for the entire mortgage debt. This is sometimes called issuing mortgage certificates *against the pool,* and was referred to in the testimony recently taken in the case. Code, Article 16, Section 253, places a conveyance to a third person with power to sell on condition, in the same general category, as far as the exercise of the power is concerned, as foreclosure of any mortgage under a power of sale contained therein, and recognized, if it does not provide, an expeditious remedy for the foreclosure of said mortgages. Union Trust Company vs. Gray, 100 Md. 99; Real Estate Trust Company vs. Union Trust Company, 102 Md. 46." [End of extract Thomas brief.]

Wells, J., of Supreme Judicial Court of Massachusetts, in Lowell vs. Boston, 111 Mass. 454, discussed a question at least somewhat analogous to the case of Van Witzen in 79 Md. 405 (at 412) and there said:

"The individual by reason of his capacity, enterprise or situation, might be able to employ the money or property there conferred upon him in such manner as to be able to furnish employment to a great number of the community, to give a needed impulse to business of various kinds and thus promote general prosperity and welfare.

"In this view it might be shown to be for the public good to take from the unenterprising and shiftless their unemployed capital and entrust it to others who will use it to better advantage for the interest of the community. But, it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken and an unjustifiable usurpation."

It is true this was a case involving the power to tax. The power to tax is even more extensive than the police power of the State, yet it may not be exercised for the benefit of any one person or class of persons.

On which Mr. Justice Miller in Savings Loan Association vs. Topeka (20 Wall. 655), said:

"To lay with one hand the power of government on the property of the citizen, and with the other hand to bestow [fol. 122] it on favored individuals to aid private enterprise and build up private fortunes is none the less robbery, because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms." * * * "There can be no lawful tax which is not paid for a public purpose."

In the March, 1934, number of Illinois Law Review (just out) is an article by Ben Ely, Jr., of the Missouri Bar (being a chapter of his forthcoming book), on "Rights Against Banks Under Restriction or Conservatorship," and is of more than passing interest. Students interested in the whole history of moratorium legislation from the time of the early Greeks will find an interesting historical review of the subject in the May, 1933, number of Harvard Law Review (Vol 46, p. 1061, or page 1 of the May number), cited in the brief of Mr. Thomas, and also by Mr. Marbury, Jr. In addition thereto, an interesting analysis and comment on the Minnesota case of Blaisdell in the February, 1934, number of Harvard Law Review, at p. 660.

While the Maryland case referred to of Van Witzen in 79 Md. at 412 is confessedly a case of eminent domain, the Court says whether the use is a public or a private use is a judicial question. May we not apply at least the principles of that case to the instant case, by way of analogy, in

determining, as a judicial question, whether Ch. 56 of the Special Session of 1933 is emergency legislation in fact, under the broad police power extended to meet great public need of a most drastic character; one so great in nature as to even warrant the impairment of contract for the safeguarding of which the prohibition against State action was written into the Federal Constitution for the protection of the creditor class. Great must be the crisis or emergency to warrant the application of the principle recognized and expressed by the New York Court of Appeals in this language:

"That the government may be required in times of stress, so to legislate as to nullify private contracts is an implied term of every contract, so that such legislation, if enacted, does not impair the obligation of contract within the meaning of the limitation." Sliosberg vs. N. Y. Life Ins., 244 N. Y. 482.

[fol. 123] This language seems almost like the creation of judicial fiction to justify a temporary moratorium against the operation of the Federal provision inhibiting State legislative impairment of contract. Great indeed must be the state of emergency to justify such contortion. I can not persuade myself to the belief that there has been no impairment of contractual rights, as inhibited by Art. 1, Sec. 10 of the Federal provision merely because some slow, archaic, inadequate, impractical, cumbersome and expensive form of foreclosure may still be open to holders of split mortgages, having less than 25 per cent. interests, whereas the more favored class, of 75 per cent. and upwards, have all their rights (obtained under the same mortgage indenture) unimpaired. Denial of rights, based on an arbitrary selection of a numerical fraction, is classification arbitrary in nature and unreasonable in character.

Nor can I find from the record evidence in this case anything other than the legislative preamble (always entitled to great respect) to warrant the assumption of State emergency, as applied to an arbitrary selection of a given fraction, to warrant the exercise of police power to override the Federal inhibition, and make it subservient to a State said to be in great distress. The whole history of this legislation, as disclosed by the evidence in this case, entirely satisfies me that the Legislature was beguiled to come to the re-

lief of the Mortgage Guarantee Co., the defendant in this case, and such few other commercial agencies of its same general character, which, to a less degree, dealt in split mortgages in the age of Coolidge prosperity, when they considered it even commercially unwise, as affecting the price of securities sold, to even insert the customary commercial restriction found in the ordinary bond indenture, restraining the foreclosure rights of limited minorities. To meet such emergency, they persuade a benevolent and complacent Legislature to declare itself in a "state of emergency" with relation to less than 25 per cent. minorities in split mortgages. But when the debtor class as a whole (in Altfeld Senate Bill No. 68) tried to get a general moratorium on mortgage foreclosures, the Legislature refused to become so exercised, and killed the bill. (Pl. Ex. 2.)

Argument based on evil effects of procedure has been [fol. 124] addressed to the Court; to wit, that unless Chapter 56 of Special Session of 1933 is upheld as constitutional, holders of minority interests in split mortgages will rush into the equity Courts in Baltimore City, even in the given cases of large apartment houses in which this record shows that Mr. Tucker, on behalf of interests of over 75 per cent. has already obtained consent decrees and been appointed trustee to sell, and ask representation as co-trustee, and in the event of even a sacrifice sale, they could thus make up, in commissions what they fail to obtain in purchase price. That is an argument of mere convenience, and one wholly beside the question of fundamental contractual rights. The evil suggested would constitute a "racket" which this and the other equity Court can meet in various ways. One method would be to refuse representation in such cases, or in appointing representation in such trusteeships to do so conditioned on waiver of commission, which I believe is what Mr. Tucker himself is voluntarily doing in appropriate cases. No evil results need be feared from that score.

It is said in argument that a decision adverse to the validity of this hybrid moratorium statute would break every savings bank in Baltimore. I apprehend no such dire result. The savings banks of Baltimore have withstood the stress and strain of depression without a break, as far as I know, of a single link in the chain. Happily, the heavy pull is believed to now be over, and necessary

readjustments have been conservatively made. Savings banks are not dealers in split mortgages. They have been reasonably conservative lenders on home properties. While real estate depression has considerably shrunken the value of their mortgaged security, the National Government, in what some people think too paternalistic an attitude, has provided a National agency in the Home Owners Loan Corporation, with a hook up in every city and county in the Union, with an honest and efficient administration of its affairs, evincing liberality, hedged by prudence. Borrowers are being relieved of their savings bank indebtedness and are having their obligation extended over a period of 15 years, at reduced interest, and on convenient installment payments. Any problem of this character of the savings banks has been solved.

Building associations are now advertising in the daily [fol. 125] papers that they are prepared to make loans on home properties. I saw such advertisement this morning.

It is also said in argument that throwing of some six million apartment house mortgages on the real estate market of Baltimore would disastrously depress the real estate market. In an earlier breath in argument, it had been stated there was no such thing as a real estate market today in Baltimore. There is testimony in this record somewhat to the contrary.

A purely commercial answer may be that minority interests, insisting on sale, will take their proportionate loss in such cases, and need not hope to make it up in commission on majority interests.

(b) Majority interests, with reasonable opportunity for the exercise of conservative commercialism, may find ways and means to satisfy minor interests.

(c) The Court of Appeals may make liberal allowance for the exercise of reasonable discretion of the lower Court in determining when a property in this locality and market has brought a reasonable and fair price, without too strict an application of the rule that the price brought must be one to "shock the conscience of the chancellor" before it can be set aside for mere inadequacy. And still other ways of working out commercial transactions may be devised.

It can hardly be said that fair market value is al ys established by the price obtained, after due advertise-

ment and a sale legally conducted, without comparing the price bid to the value of the property. To illustrate. I recall from personal knowledge an instance of a valuable residence in the best portion of Roland Park being extensively advertised for auction sale with expenditure of over $100 in advertising; all real estate offices being circularized in addition. Auction held on good day, fine weather, but without a single bid on the property No sale resulted. It was soon after sold at private sale for over $30,000 cash. Had there been a bid at auction of $5,000, will anyone say such sale should be ratified by the equity Court. The same property was shortly after resold for $35,000.

[fol. 126] By a strange coincidence, at the luncheon hour today, I signed I think ten applications for mortgage foreclosures on consent decree, on application of one of the largest savings banks of Baltimore—not cases of split mortgages, but regular mortgage foreclosures. There is no moratorium applicable to them. I merely mention this in reply to one branch of the argument in which it was said the savings banks do not attempt foreclosures on the market, because they know it is useless to do so.

For the reasons, roughly given, as I have just stated them, I declare Chapter 56, Act Special Session of 1933, unconstitutional.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

DECREE—Filed March 22, 1934

The above entitled case having come on for hearing on the amended petition of Mary E. Matthews and John Matthews and answers thereto filed by the Mortgage Guarantee Company and the United States Mortgage Company and testimony being taken and being argued by counsel.

It is, thereupon, this 22nd day of March, in the year nineteen hundred and thirty-four, by the Circuit Court No. 2, of Baltimore City, Adjudged, Ordered and Decreed that the Mortgaged property in the proceedings mentioned be sold, at or after any one of the periods limited in the mortgage filed for the forfeiture of said mortgage; that Clarence A. Tucker be and he is hereby appointed Trustee to make said sale, and that the course and manner of his proceedings shall be as follows: he shall first file with the

Clerk of this Court a Bond to the State of Maryland, executed by himself and a surety or sureties to be approved by this Court, or by the Clerk thereof, in the penalty of Three Thousand Dollars, conditioned for the faithful performance of the trust reposed in him by this decree, or to be reposed in him by any future Decree or Order in the premises: he shall then proceed to make the said sale, having given at least three weeks' notice by advertisement, inserted in such daily newspaper or newspapers published in [fol. 127] the City of Baltimore, as he shall think proper, of the time, place, manner and terms of sale, which shall be one-third cash, the balance in six and twelve months, [or all cash as the purchaser may elect,] the credit payment to bear interest from the day of sale, and to be secured by the note or notes of the purchase or purchasers, endorsed to the satisfaction of the said Trustee; and as soon as may be convenient after any such sale or sales, the said Trustee shall return to this Court a full and particular account of his proceedings relative to the sale; with an affidavit annexed of the truth thereof, and of the fairness of said sale; and on obtaining the Court's ratification of the sale, and on the payment of the whole purchase money, and not before), the said Trustee shall by a good and sufficient deed, to be executed, acknowledged and recorded, according to law, convey to the purchaser or purchasers his, her or their heirs, the property and estate to him, her or them sold, free, clear and discharged from all claim of the parties hereto, Petitioner and Mortgagor and those claiming by, from or under them, or either of them. And the said Trustee shall bring into this Court the money arising from said sale, to be distributed under the direction of this Court, after deducting the cost of this suit, and such commission to the said Trustee as this Court shall think proper to allow in consideration of the skill, attention and fidelity wherewith he shall appear to have discharged his trust; provided, that before the sale herein before decreed shall be made, a statement of the mortgage claim duly verified by affidavit, as required by law, be filed in said cause.

Eugene O'Dunne.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

ORDER FOR APPEAL—Filed March 28, 1934

Mr. Clerk:

Please enter an appeal on behalf of the United States Mortgage Company and the Mortgage Guarantee Company, intervening respondents in the above entitled cause, and [fol. 128] each of them, from the decree passed herein on March 22, 1934, and from the order of the Court bearing date March 21, 1934, overruling respondents' demurrer, and send transcript of the record to the Court of Appeals of Maryland.

William L. Marbury, Jr., Knapp, Tucker & Thomas,
Solicitors for Above-named Respondents.

(Affidavit Annexed.)

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

STIPULATION, WAIVING BOND, ETC.—Filed March 28, 1934

It is agreed between counsel of the parties to the above case as follows:

1. That no appeal bond shall be required in this cause, and that pending the appeal and the final disposition thereof, the operation of the decree shall be stayed.

2. That in making up the record to the Court of Appeals the Clerk shall omit therefrom the Petition and order under which United States Mortgage Company and Mortgage Guarantee Company become intervening Respondents, their Answer to the original Petition for a foreclosure decree, the Petitioner's Demurrer thereto, th Petition with order thereon, asking to be allowed to amend such demurrer with the proposed amendment incorporated therein and the order sustaining the intervening Respondent's motion of ne recipiatur of such proposed amendment, and in lieu thereof there may be inserted in the Record after setting out the original Petition aforesaid and the Exhibits filed with same, the following statement in connection therewith:

"Following the filing of the aforegoing Petition and Exhibits, United States Mortgage Company, the owner of the equity of redemption in the property described in the mortgage, and Mortgage Guarantee Company, the holder [fol. 129] of record and/or duly authorized representative of approximately 83% of the unpaid mortgage debt, secured by the said mortgage, intervening Respondents, upon their application and under an order of Court, duly answered the said Petition, opposing the granting of the decree prayed for in the Petition and setting up the provisions of the Act of 1933, Chapter 56, passed at the extraordinary session in 1933 of the General Assembly of Maryland.

To this Answer the Petitioner duly demurred, attacking the constitutionality of the Act in question, but subsequently asked leave to withdraw said demurrer, which was granted as appears below."

3. That respect to Exhibits filed in the case the Clerk in making up the Record may set out the same consecutively immediately following the testimony, except those exhibits which have been set out with and as part of the pleadings as to which latter it shall be sufficient to refer to the fact that such Exhibit has, or Exhibits have been set out with the appropriate pleading of which it is, or they are, a part. Plaintiff's Exhibit No. 5 need not be set out in the Record, as it is in the precise form of Plaintiff's Exhibit No. 4, except that it is intended for execution by a corporation.

4. That a copy of this Agreement shall be inserted in the Record.

J. Calvin Carney, Frederick H. Hennighausen, Solicitors for Petitioners. William L. Marbury, Jr., Knapp, Tucker & Thomas, Solicitors for Intervening Respondents.

IN CIRCUIT COURT NO. 2 OF BALTIMORE CITY

ORDER OF TRANSMITTAL

Which said appeal being by the Court here also granted, it is thereupon Ordered by the Court here that a transcript of the record of proceedings in the case be transmitted to [fol. 130] the Court of Appeals of the State of Maryland under the rules thereof and the same is transmitted accordingly.

Test: John Pleasants, Clerk of the Circuit Court No. 2 of Baltimore City.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 131] IN COURT OF APPEALS OF MARYLAND,
APRIL TERM, 1934

No. 50

UNITED STATES MORTGAGE COMPANY AND THE MORTGAGE GUARANTEE COMPANY,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

DOCKET ENTRIES

Appeal from the Circuit Court No. 2 of Baltimore City.
Filed March 28, 1934.
July 6, 1934.—Decree affirmed, with costs to the appellee.
Opinion filed. Op., Digges, J. (Urner, J., concurs in the result.)
July 7, 1934.—Decree filed.

Bill of costs omitted in printing.

[fol. 132] IN COURT OF APPEALS OF MARYLAND,
APRIL TERM, 1934

No. 50

UNITED STATES MORTGAGE COMPANY and THE MORTGAGE GUARANTEE COMPANY

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

DECREE—Filed July 7, 1934

The appeal in the above entitled case standing ready for hearing was argued by counsel for the respective parties,

and the proceedings have since been considered by the Court.

It is thereupon on this 6th day of July, 1934, by the Court of Appeals of Maryland, and by the authority thereof, adjudged, ordered and decreed that the decree dated March 22nd, 1934, of the Circuit Court No. 2 of Baltimore City, be and the same is hereby affirmed with costs to the appellee.

Carroll T. Bond, Hammond Urner, Wm. H. Adkins, T. Scott Offutt, W. Mitchell Digges, F. Neal Parke.

[fol. 133] IN COURT OF APPEALS OF MARYLAND,
APRIL TERM, 1934

No. 50

UNITED STATES MORTGAGE COMPANY and THE MORTGAGE GUARANTEE COMPANY,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

OPINION—Filed July 6 1934

Judge Digges delivered the Opinion of the Court.
Judge Urner concurs in the result.

[fol. 134] On July 30, 1925, Walter H. Worner, unmarried, executed to the Mortgage Guarantee Company, of Baltimore City, a mortgage on property located in Baltimore City known as No. 1339 Patapsco Avenue, to secure a debt of $3,000 due by him to the mortgagee. On July 30, 1932, the Mortgage Guarantee Company assigned to Mary E. Matthews and John Matthews an undivided 500/2950 share, equivalent to $500, in the Worner mortgage, $50 having been paid on the principal at the time of the assignment; which $500 interest in the mortgage thereby assigned was due and payable on July 30, 1935. The mortgage contained the usual covenant for the payment of the principal debt and interest, for the payment of all taxes and assessments, and for keeping the prop-

erty insured for the benefit of the mortgagee. The mortgage also contained the following language: "And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City for a sale of the property hereby mortgaged in accordance with Sections 720 to 732, inclusive, of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto. And upon any default in the terms of this mortgage a sale may be made by the said mortgagee, its successors or assigns, or by its or their attorney under Article LXVI, Sections 6 to 10 inclusive, of the Maryland Code of 1904, Public General Laws, or any other general or local laws of the State of Maryland relating to mortgages. And it is agreed that upon any sale of said property under this mortgage, whether under the above assent to a decree or under the [fol. 135] above power of sale, the proceeds of sale shall be applied as follows, to wit, first, to the payment of all expenses incident to said sale, including a counsel fee of twenty-five dollars for conducting the proceedings if without contest, but if legal services be rendered to the mortgagee or its assignee or to the trustee or party selling under the power of sale in connection with any contested matter in the proceedings, then such other counsel fees and expenses shall be allowed out of the proceeds of sale as the Court may deem proper, and also a commission to the party making said sale equal to the commission allowed trustees for making sales of property under decree of a Court of Equity in Maryland; second, to the payment of all claims of the mortgagee, its successors or assigns hereunder, whether the same shall have then matured or not; and third, the balance if any to the said mortgagor, his heirs, executors, administrators or assigns." (Sections 6 to 10 of Article 66 of the Code of 1904, referred to in the mortgage, are now the same sections of the same Article of the Code of 1924.)

Section 720 of Chapter 123 of the Acts of 1898 is now codified as Section 720 of Article 4 of the Code of Public Local Laws, title "Baltimore City," subtitle "Mortgages," was in force at the date of the execution of the mortgage, and reads as follows: "In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in the said city, wherein the mortgagor

shall declare his assent to the passing of a decree for the [fol. 136] sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises." This section was originally enacted by Chapter 181 of the Acts of 1833, and subsequently amended by Chapter 249 of the Acts of 1836 and Chapter 197 of the Acts of 1890. It was also designated in the Code of Public Local Laws of 1860 as Article 4, Section 782, and in the Code of Public Local Laws of 1888 as Article 4, Section 692. There has been no amendment since the enactment of Chapter 123 of the Acts of 1898, until the passage of Chapter 56 of the special session of the General Assembly of 1933. By that Chapter it was enacted: "That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title 'Baltimore City,' subtitle 'Mortgages,' said new section to be known as 720-A and to follow immediately after Section 720, and to read as follows: 720-A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a [fol. 137] decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holedrs of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720." Section 2 of Chapter 56 provides: "That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period

of time from the date this Act takes effect to the first day of June, 1935." By Section 3 of this Chapter the law was declared to be an emergency one and necessary for the immediate preservation of the public health and safety, and being passed by affirmative vote of the necessary three-fifths of all the members elected to each of the two houses of the General Assembly, should take effect from the date of its passage. Chapter 56 was approved and became effective December 15, 1933.

The case of Richardson vs. Owings, 86 Md. 663, construed Section 720 of Chapter 123 of the Acts of 1898, and held that the holder of a fractional part of a mortgage on property in Baltimore City was entitled to the benefits of and to proceed under the provisions of Section 720 as it then stood. The date of that decision was January 4, 1898, and the effect of it was to hold that the word "mortgagee" therein used applied to any fractional holder of such a mortgage, as fully as where the whole [fol. 138] mortgage was held by one individual. That decision permitted any holder of a fractional part of a mortgage, without regard to the amount of such holding or interest, to apply for and obtain a decree in accordance with the provisions of Section 720.

It will thus be seen that at the time of the execution of the mortgage here in question, as also at the time of the assignment to Mary E. and John Matthews, the appellees, by which they became the holders of 500/2950 of said mortgage, they had the right to apply for and receive a decree for the sale of said property, without regard to whether or not at that time there had been a default in the mortgage. While they could obtain such decree and have a trustee appointed to make sale, the property could not be sold until a default had occurred.

On December 22, 1933, seven days after Chapter 56 of the Acts of 1933 became effective, the appellees petitioned Circuit Court No. 2 of Baltimore City for a decree and appointment of a trustee to make sale of the property, in which petition they alleged that the mortgage was in default in that the covenant to pay the taxes had not been kept, by reason of the taxes for the years 1932 and 1933 not being paid. Accompanying the petition as exhibits, there were filed the mortgage and assignment to the appellees of their fractional interest.

Following the filing of the petition, the appellant United States Mortgage Company, the then owner of the equity [fol. 139] of redemption in the property described in the mortgage, and the Mortgage Guarantee Company, the other appellant, the holder of record or the duly authorized representative of approximately 83% of the unpaid mortgage debt secured by the mortgage, upon their application and under an order of Court, were permitted to intervene in the proceeding as respondents, and answered the petition opposing the granting of a decree prayed for therein, and setting up the provisions of the Act of 1933, Chapter 56, as a reason why the petition of the appellees should not be granted.

Testimony was taken in open Court, and after argument a decree was passed on March 22, 1934, wherein it was ordered that the mortgaged property in the proceedings mentioned be sold at or after any one of the periods limited in the mortgage filed for the foreclosure of said mortgage, and appointing Clarence H. Tucker as trustee to make said sale, requiring bond of the trustee, and particularly describing the manner and mode of procedure in making the sale. From this decree the appeal here was taken.

The appellees contended that the Act of the special session of 1933, Chapter 56, was unconstitutional and void as being in conflict with Section 10 of Article 1 of the Constitution of the United States, which prohibits the State from passing any law impairing the obligation of a contract; that said Chapter 56 denies to the appellees the equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States; and that [fol. 140] the said Act contravenes the Declaration of Rights of Maryland in that it deprives the appellees of their property contrary to the law of the land within the meaning of Articles 19 and 23 and 44 of the Declaration of Rights.

The appellants deny those contentions, and in addition to that denial contend that by the language of the mortgage, the mortgagor assented to the sale of the property under and in accordance with the provisions of Sections 720 to 732, inclusive, of Chapter 123 of the Acts of 1898 (now codified as Secs. 720 to 732 of Art. 4 of the Code of Public Local Laws, 1930, title "Baltimore City," subtitle "Mortgages"), or any amendments or additions thereto;

which meant that the mortgagor consented to having the proceedings for a consent decree governed by any future amendments or additions to those sections which should become effective before the application for the consent decree.

While it is true that at the time this language was incorporated in the mortgage, there had been no explicit amendment or addition to those sections of the law providing for consent decrees, the argument is made that the language was intended to apply to any future amendments or additions. We are unwilling to give sanction to such a construction; and we hold that the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage. A contrary holding would mean that a complete destruction of that remedy was contemplated.

[fol. 141] Coming now to the contention that the said Chapter 56 of the Acts of 1933 is unconstitutional because in violation of the Federal Constitution's prohibition against States passing laws violating the obligation of contracts: There is no doubt of the power of the State to change the remedy, or the mode of enforcing the right contained in the contract, provided the remedy which is left, or the method substituted therefor, be substantially equivalent in coercive force to that provided by the law when the obligation was contracted. Or, as stated in New Orleans & L. R. Co. vs. Louisiana, 157 U. S. 219, 39 L. ed. 679: "Modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away." Bronson vs. Kinzie, 1 How. 311, 315; Von Hoffman vs. Quincy, 4 Wall. 535, 552; Conn. M. Life Ins. Co. vs. Cushman, 108 U. S. 51, 64; McGahey vs. Virginia, 135 U. S. 662, 693; Home Bldg. Assn. vs. Blaisdell, 290 U. S. 398, 78 L. ed. 255, and cases there cited in note 13; State, use of Isaac, vs. Jones, 21 Md. 432; Madigan vs. Workingmen's Bldg. Assn. 73 Md. 317; Wilson vs. Simon, 91 Md. 1; B. & O. R. R. Co. vs. Maughlin, 153 Md. 367. "The obligation may be impaired by a change in the rem-

[fol. 142] edy in force at the time when the contract was entered into. If the subsequent law subtracts from the ef-

fectiveness of the remedy and provides no substitute substantially equivalent to the former remedy, it is obnoxious to the contract clause. The obligee is not entitled to a remedy of the same form as that in force when the obligation was contracted. The form of the remedy does not enter into his right, which inheres merely in the effectiveness of his remedy, but he is entitled to some remedy, and that remedy must be substantially equivalent in coercive force to that provided by law when the obligation was contracted." 15 Am. & Eng. Encyc. of Law (2d ed.) 1052. "It is also generally conceded that the State, under its general power to change and alter remedies, may vary the times of holding courts, shift jurisprudence from one to another, create new courts and abolish old ones without in any wise impairing the obligation of contracts." 6 R. C. L. 364.

Applying this settled law to the facts of the case now before us, let us ascertain if those facts show a change, modification or abolition of the remedies available to the mortgagees at the time the mortgage was executed, such as would leave them with no remedy at all, or with a remedy which is not substantially equivalent in coercive force to that provided by the law when the obligation was contracted. This record discloses that at the time the mortgage was executed, certain remedies were available to the mortgagees for the enforcement of the rights and obliga-
[fol. 143] tions contained in the contract. These consisted, perhaps, of five distinct modes of procedure to enable the mortgagee to enforce his right of payment against the property mortgaged: (a) Strict foreclosure; (b) foreclosure by formal proceedings; (c) foreclosure under a power to sell; (d) foreclosure under an assent to decree; and (e) sale under a breach of condition or happening of a future event.

The mortgage itself contains two methods of procedure, one under the provisions of the consent decree statute, and the other under a power contained in the mortgage as prescribed and set out in Article 66, Sections 6 to 10, inclusive, of the Code of Public General Laws. It is clearly apparent that Chapter 56 of the Acts of 1933 either abrogated entirely or seriously affected the appellees' right to proceed under the provisions of the consent decree statute, because before its passage the appellees, holding a fractional part of the mortgage, were entitled to apply for and

obtain a decree for sale without the co-operation of the other holders of portions of the mortgage; whereas by Chapter 56 they could only exercise this right in conjunction with a sufficient number of the other fractional holders to amount to 25% of the unpaid portion of the mortgage debt. In other words, before the Act they could proceed alone, while after the Act they must obtain the consent of those whose combined interest would amount to at least 25% of the mortgage debt.

[fol. 144] Chapter 57 of the Acts of the Special Session of 1933, approved and becoming effective on December 15, 1933, the same date as the effective date of Chapter 56 hereinbefore discussed, modified the summary remedy as contained in Article 66, Sections 6 to 10, inclusive, of the Code of Public General Laws (providing for the sale of mortgaged property under a power contained in the mortgage) so as to preclude the use of the remedy therein provided to all persons holding less than 25% of the entire unpaid principal debt; such prohibition against use of such remedy being for the period between the effective date of the Act and the first day of June, 1935, which period is declared to be the period of emergency. It is thus evident that the express purpose of the Legislature in passing Chapters 56 and 57 of the Acts of 1933, Special Session, and which is so declared in the preamble to the two Acts, was to remove and take away from all mortgagees, similarly situated as the appellees, the right of a summary proceeding for the sale of the property mortgaged. In other words, before the enactment of said Chapters 56 and 57, under the express terms of the contract contained in the mortgage, the appellees could resort to either one of two summary proceedings for the sale of the mortgaged property for the payment of the mortgage debt, in case of a default in any of the covenants of the mortgage, and had the absolute legal right to such remedies without the co-operation or consent of any of the other fractional holders of the mortgage; whereas after the passage of said Chap-

[fol. 145] ters 56 and 57 all summary remedies by sale of the property were denied, unless and until at least 25% in interest of the unpaid mortgage debt should join in the foreclosure proceeding.

The question then is: Were the remedies contracted for in the mortgage, and which were in accordance with the law as it stood at the time of the execution of the mortgage

and the assignment of a portion thereof to the appellees, so modified or changed as to amount to an impairment of the obligation of the contract; and if so, are the remaining remedies open to the appellees as effective for the enforcement of their rights as the ones abrogated? The two remedies denied to the appellees are so interwoven with the right contracted for that the abolition of the remedy impairs the right, and is repugnant to the constitutional provisions prohibiting the states from passing legislation impairing the obligation of a contract. The abstract statement of a right embodied in a contract, unaccompanied by an adequate legal or equitable remedy for the enforcement of such right, is of no benefit to the parties. When at the inception of the contract there are adequate summary remedies provided by law for the enforcement of the right, and subsequently these remedies are so changed, modified or abrogated as to take away the remedy entirely, or leave remaining a remedy which is not of equivalent coercive force, then such change of remedy so affects the right as to render such legislation obnoxious to the constitutional provision. Cases, supra.

[fol. 146] In the case under consideration the appellees, at the time they became holders of a portion of the mortgage now owned by them, were entitled by the terms of the contract to pursue the remedies specified in the mortgage for the enforcement of the right of payment. Both of the remedies contracted for provided for a summary method of procedure, and must be held to have been an inducement to purchase the fractional part of the mortgage which was sold to them. It requires no argument to convince us that the right to proceed to the collection of the money due the appellees upon default, without the consent or cooperation of any other person interested in the mortgage, was an extremely valuable portion of the contract, and doubtless was no small part of the consideration which induced the appellees to purchase the interest now held by them. If, then, all of such remedies are taken away, and there remains a totally inadequate remedy, as compared to those taken away, it seems clear that an attempt to make such legislation applicable to pre-existing mortgages is unconstitutional and void.

The constitutionality of Chapter 56 is next attacked on the ground that it is special legislation and denies the appellees the equal protection of the laws, contrary to the

14th Amendment of the Constitution of the United States and to similar provisions of the Constitution and Bill of Rights of Maryland. In other words, it is claimed by the appellees that this legislation is "class legislation," a [fol. 147] term often carelessly used, sometimes called "local" or "private" legislation, consisting of those laws which are limited in their operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory or state. The provisions of the 14th Amendment of the Federal Constitution have been construed practically with uniformity to grant to all persons equality before the law, in the sense that that constitutional provision renders void all State statutes which make any unreasonable or arbitrary discrimination between different persons or classes of persons. Those portions of the Maryland Constitution and Declaration of Rights relied on, afford protection to its citizens against unreasonable or arbitrary discrimination in like manner and to the same extent as the 14th Amendment of the Federal Constitution. These constitutional provisions, national and state, prohibit the State Legislature from making any clearly unreasonable and arbitrary classification, which would result, if allowed, in discrimination beneficial or detrimental to an individual or class, and which did not likewise apply to all other individuals or classes under like circumstances and conditions. Courts and authorities on the subject have no difficulty in stating the general principle, but it is impossible to harmonize the decisions in the application of the principle to the particular facts of a given case. The question, therefore, on this phase of the case, is: Was the classification made by the Legislature [fol. 148] a reasonable one, and having a reasonable relation to the legislative objective, not arbitrary and capricious? With reference to the state of an emergency which is declared by the Legislative to exist, in the preamble to the Acts under consideration, we think it wise to observe that it can have no effect upon the constitutionality of the Acts. We have no doubt that the Legislature gave expression to a generally recognized fact that an emergency in the economic affairs existed, but the constitutionality of the Acts cannot be tested or decided upon that ground. If the law under consideration was unconstitutional in the absence of an emergency, in our opinion it cannot be held to be constitutional because of any fancied or real emer-

gency, but its constitutionality must be tested in the same way as if it had been passed in times of economic prosperity. Kenly vs. Huntingdon Bldg. Assn., (Md.) Daily Record, January 25, 1934, 170 Atl. 526, 90 A. L. R. 1321. Guided by that principle, the question resolves itself into whether or not the classification made by the Legislature in Chapters 56 and 57 of the Special Session of 1933 is a reasonable one, or so arbitrary and capricious as would warrant the Court in striking them down. We must bear in mind that this legislation deals solely with a remedy, and the Legislature doubtless concluded that the remedies theretofore afforded for every fractional owner of a mortgage should be modified or changed so that the particular remedy could only be exercised by those mortgagees, singly or in combination, who controlled or represented [fol. 149] 25% of the mortgage debt. It was doubtless brought to the legislative attention that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the Acts in question. This was an evil found by the Legislature to exist, and the purpose of the classification was to diminish the evil by determining that this remedy should be only available to those holding at least 25% of the mortgage debt then unpaid. The classification thus made would seem clearly to have direct relation to the purpose which the Legislature had in mind, and which we cannot say was arbitrary or fanciful.

In Nos. 11 and 12 of this term we had occasion to fully consider and determine the power of the Legislature to make classifications; and it is not necessary to repeat what was there said, or cite again the authorities therein referred to. If the classification here made had been original legislation upon this subject, it would hardly be contended that it was arbitrary or unreasonable; and the fact that it is made in substitution of a remedial Act, can make no difference in respect to its constitutionality. Classification being primarily a question for the Legislature, and the legislation acting uniformly and equally upon all persons within the designated classes, and being found by us

[fol. 150] not to be arbitrary, fanciful or capricious, it follows that it is not obnoxious to the constitutional provision relied upon.

For the reasons above set forth, we hold that Chapters 56 and 57 of the Acts of the Special Session of the General Assembly of 1933 have no effect upon the mortgage here in controversy; and the attempt therein to abrogate the summary remedies contained in the mortgage, during the time of the emergency therein specified, is abortive, as impairing the obligation of a contract contained in the mortgage; and so far as affecting the mortgage now under consideration, is unconstitutional and void.

Decree affirmed, with costs to the appellees.

[fol. 151] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 152] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1934

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted and the case is assigned for argument immediately following No. 186.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
OCT 4
CHARLES ELMORE

No. 441

In the Supreme Court of the United States

OCTOBER TERM, 1934

UNITED STATES MORTGAGE COMPANY and MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION AND BRIEF IN SUPPORT THEREOF

JAMES THOMAS,
WILLIAM L. MARBURY, JR.,
Counsel for Petitioners

TABLE OF CONTENTS.

	PAGE.
PETITION FOR WRIT OF CERTIORARI	1
Summary Statement of Matter Involved	1
Reasons Relied on for the Allowance of the Writ	5
BRIEF IN SUPPORT OF PETITION	9
Opinions of Courts Below	9
Jurisdiction	9
Statement of the Case	10
Specification of Errors	13
Argument	14
Summary of Argument	14
Point A	
The Assent Contained in the Mortgage Expressly or by Necessary Implication Contemplates Amendments or Additions to the Original Act	14
Point B	
The Act Operates Only Upon the Remedy and Does Not Impair the Substantive Rights Under the Mortgage Contract	16
Point C	
An Economic Condition Constituting an Emergency Existing (and continuing), the Act Is a Legitimate Exercise of the Police Power of the State	20
CONCLUSION	22
APPENDIX	23

CITATIONS.

Statutes:	
Chapter 56, Acts of 1933 (Special Session)	2, 3
Chapter 123, Acts of 1898, Secs. 720-732	2
Sec. 237 Judicial Code as amended by Acts Feb. 13, 1925, Chapter 229, Sec. 1 (U. S. C. A. Title 28, Sec. 334(b))	10
Chapter 57, Acts of 1933 (Special Session)	21
Bagby's Code of Md., 1924, Art. 66, Secs. 6-10	21
Cases:	
Ahren v. Ijams, 158 Md. 412, 418	11, 19
Blaisdell v. Home Bldg. & Loan Assn., 189 Minn. 426	6
Block v. Hirsch, 256 U. S. 135	6, 7, 21
Bronson v. Kinzie, 1 Howard (42 U. S.) 311, 315	18

	PAGE
Chastleton Corp. v. Sinclair, 264 U. S. 543	7
Conkey v. Hart, 14 N. Y. 22	6, 16
Cronise v. Clark, 4 Md. Ch. 403	11
Durham Realty Co. v. La Fetra, 230 N. Y. 429	21
Funkhauser v. J. B. Preston Co., 290 U. S. 163	14
Henley v. Meyers, 215 U. S. 373	16
Home B. & L. Assn. v. Blaisdell, 290 U. S. 398	6, 7, 21
Marcus Brown Holding Co. v. Feldman, 256 U. S. 170	6, 7, 21
Mason v. Haile, 12 Wheaton (25 U. S.) 370	16
People ex rel. Durham Realty Co. v. La Fetra, 230 N. Y. 429	6
Richardson v. Owings, 86 Md. 663	11, 12
Scott et al. v. District Court et al., 15 N. D. 259	6, 15
State, etc., v. Circuit Court (S. D. 1933), 249 N. W. 631	16
Stocking v. Hunt (N. Y.), 3 Denio 274	6
Waggoner v. Flack, 188 U. S. 595, 602	18
W. B. Worthen Co. v. Thomas, 292 U. S. 426	21
Williams v. Williams, 7 Gill (Md.) 302	11
Woltz et al. v. Asheville Safe Deposit Co. et al., 206 N. C. 239	6

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. .....

UNITED STATES MORTGAGE COMPANY and MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable, CHARLES EVANS HUGHES, *Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.*

Your Petitioners respectfully show:

I

SUMMARY STATEMENT OF MATTER INVOLVED

This case presents the question of whether parties to a mortgage contract, by stipulating therein that the mortgage may be foreclosed under a particular form of statutory ex parte proceeding, can deprive the State of Maryland of the power to enact laws for the purpose of regulating abuses of this procedure which are contributing to a grave economic emergency.

The purpose of this petition is to have this Court review a decision of the Court of Appeals of Maryland, holding invalid Chapter 56 of the Acts of 1933, Special Session, of the General Assembly of Maryland. That Act sought to restrict the use of a particular statutory form of procedure for the foreclosure of mortgages to the holders of not less than a 25% interest in any mortgage. The Court of Appeals of Maryland struck down this legislation on the ground that it impaired the obligation of contracts in violation of Section 10 of Article 1 of the Constitution of the United States, although holding at the same time that the Act did not deprive the holders of less than a 25 per cent. interest in a mortgage of the equal protection of the laws, for the reason that the classification adopted by this legislation was reasonably adapted to meet "an evil found by the Legislature to exist," namely "that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered."

The remedy which the Act of 1933 was intended to regulate was provided by Chapter 123 of the Acts of 1898, Section 720-732, inclusive, now codified as Section 720-732 inclusive of Article 4 of the Code of Public Local Laws of Maryland, title "Baltimore City,"

sub-title "Mortgages" (1930 edition). Section 720 provides in part:*

> In all cases of conveyances * * * wherein the mortgagor shall declare his assent to the passing of a decree for the sale * * *, it shall be lawful for the mortgagee, or his assigns, at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof * * * who shall thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages * * *.

There was no amendment of this section after its enactment until the passage of Chapter 56 of the Acts of 1933, Special Session, which provides in part as follows:

> In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this section, during the period this section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and ex parte remedies given under Section 720.

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* Section 720 of Chapter 123 of the Acts of 1898 and Chapter 56 of the Acts of 1933, Special Session, are printed in full in the appendix.

> That the period of the emergency herein declared as a matter of legislative determination shall be the period of time from the date this act takes effect to the first day of June, 1935.
>
> That this Act is declared to be an emergency law and necessary for the immediate preservation of the public health and safety, * * *.

On July 30, 1932, Mary E. Matthews and John Matthews acquired an undivided 500/2950 share in a certain mortgage dated July 30, 1925, from Walter H. Warner to Mortgage Guarantee Company, a Delaware corporation, on property located in Baltimore City (Record p. 8). This mortgage contained the following language (Record p. 5):

> And the said mortgagor does hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City, for the sale of the property hereby mortgaged, in accordance with Sections 720 to 732 inclusive of Chapter 123 of the Laws of Maryland, passed at the January session 1898 or any amendments or additions thereto.

On December 22, 1933, seven days after the amendatory act became effective, the Respondents petitioned the Circuit Court No. 2 of Baltimore City for a decree and the appointment of a Trustee to make sale of the property (Record p. 2), whereupon United States Mortgage Company, the then owner of the equity of redemption in the property covered by the mortgage, and the aforesaid Mortgage Guarantee Company, the holder of record, or the duly authorized representa-

tive of the holders of record of approximately 83% of the unpaid mortgage debt, appeared and were permitted to intervene in the proceedings, setting up the provisions of Chapter 56 of the Acts of 1933, Special Session, as a reason why the petition of the Appellee should not be granted (Record p. 10).

The Circuit Court No. 2 of Baltimore City, in its written opinion (Record p. 97), held said Act to be unconstitutional and entered a decree for the sale of the mortgaged property. From this decree the Petitioners appealed to the Court of Appeals of Maryland, which held the Act to be unconstitutional and void, on the sole ground that it conflicted with Section 10 of Article 1 of the Constitution of the United States (Record p. 116).

II

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. The case presents a federal question of substance involving the construction of the contract clause of the Constitution not heretofore determined by this Court, as the Court of Appeals of Maryland determines that an ex parte, summary, special and purely statutory form of procedure, if stipulated for in a mortgage contract, becomes a portion of the obligation of said contract, and the State thereafter can no longer repeal or amend said remedy and relegate the parties to the usual procedure provided by law or in equity for the enforcement of such contracts, or the mortgage lien given thereunder.

B. The decision of the Court of Appeals of Maryland, striking down this legislation enacted during a period of grave emergency and which was declared by the Legislature of the State to be necessary for the immediate preservation of the public health and safety, presents grave constitutional questions, upon which the highest courts of several states have reached a different conclusion; notably, North Dakota, *Scott et al.* vs. *District Court et al.*, 15 N. D. 259; South Dakota, *State, etc.* vs. *Circuit Court* (1933, not yet officially published), 249 N. W. 631; Minnesota, *Blaisdell* vs. *Home Building and Loan Asso.*, 189 Minn. 422; North Carolina, *Woltz et al.* vs. *Asheville Safe Deposit Co. et al.*, 206 N. C. 239, (all relating to legislation regulating mortgage foreclosures); New York, *Stocking* vs. *Hunt*, (N. Y.) 3 *Denio* 274; *Conkey* vs. *Hart*, 14 N. Y. 22; *People ex rel. Durham Realty Company* vs. *LaFetra*, 230 N. Y. 429, (all relating to legislation restricting the use of summary proceedings by landlords) and is not in accord with the decisions of this Court, including, among others, *Block* vs. *Hirsch*, 256 U. S. 135; *Marcus Brown Holding Co.* vs. *Feldman*, 256 U. S. 170, and *Home Building and Loan Asso.* vs. *Blaisdell*, 290 U. S. 398.

C. The decision of the Court of Appeals of Maryland strikes down legislation reasonably adapted to prevent abuse of a summary statutory remedy found by the Legislature to contribute to a grave economic emergency, the Court adopting the theory that the contract clause does not yield to the police power in this respect, and that the constitutionality of legislation

enacted during a period of great disturbance or so-called emergency must be determined without regard to its reasonableness or the existence of conditions necessitating the passage of laws safe-guarding the public health, safety and welfare,* in direct disregard of numerous decisions of this Court including *Block* vs. *Hirsch,* 256 U. S. 135; *Marcus Brown Holding Co.* vs. *Feldman,* 256 U. S. 170; *Chastleton Corp.* vs. *Sinclair,* 264 U. S. 543, and *Home Building and Loan Asso.* vs. *Blaisdell,* 290 U. S. 398.

WHEREFORE your Petitioners pray that a Writ of Certiorari be issued under the seal of this Court, directed to the Court of Appeals of Maryland, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals of Maryland, had in the case numbered and entitled on its docket No. 50, April Term, 1934, United States Mortgage Com-

* Judge Digges, in speaking for the Court, said (Record, p. 125): "With reference to the state of an emergency which is declared by the Legislature to exist, in the preamble of the Acts under consideration, we think it wise to observe that it can have no effect upon the constitutionality of the Acts. We have no doubt that the Legislature gave expression to a generally recognized fact that an emergency in the economic affairs existed, but the constitutionality of the Acts cannot be tested or decided upon that ground. If the law under consideration was unconstitutional in the absence of an emergency, in our opinion it cannot be held to be constitutional because of any fancied or real emergency, but its constitutionality must be tested in the same way as if it had been passed in times of economic prosperity."

pany and Mortgage Guarantee Company, Appellants, vs. Mary E. Matthews and John Matthews, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of such Court of Appeals of Maryland be reversed by the Court, and for such further relief as to this Court may seem proper.

UNITED STATES MORTGAGE COMPANY
AND MORTGAGE GUARANTEE COMPANY.

By

JAMES THOMAS,

WILLIAM L. MARBURY, JR.,

Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. .....

UNITED STATES MORTGAGE COMPANY and MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but was published in the Atlantic Reporter, Volume 173, page 903. It also appears on page 116 of the Record. The opinion of the Circuit Court No. 2 of Baltimore City is not officially reported; it was published in The Daily Record (Baltimore, Maryland) on the 23rd day of March, 1934, and it appears on page 97 of the Record.

II

JURISDICTION

1. The date of the decree to be reviewed is July 6, 1934, on which date the Court of Appeals of Maryland

rendered its decision, the mandate of the Court of Appeals of Maryland was transmitted to the Circuit Court No. 2 of Baltimore City thirty days thereafter, at which time the decree originally entered in the case became final in all its attributes (Record p. 115).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code as amended by the Acts of February 13, 1925, Chapter 229, Section 1 (U. S. C. A., Title 28, Section 344 (b)).

The nature of the case and the decision of the Court of Appeals of Maryland is such as to bring the case within the terms of the statutory provision aforesaid, in that the validity of a statute of the State of Maryland was assailed as unconstitutional and the Court of Appeals of Maryland held the same to be unconstitutional and void on the sole ground that it was in conflict with Section 10 of Article 1 of the Constitution of the United States.

III

STATEMENT OF THE CASE

The statement of the case made in the preceding petition under I entitled "SUMMARY STATEMENT OF MATTER INVOLVED" is hereby adopted and made a part of this brief.

The proceeding for the foreclosure of a mortgage under the Act of 1898 is ex parte until after the decree

and a sale under the decree. In order to obtain the decree it is only necessary to file the mortgage and petition for the decree. No summons is necessary and no notice is required to be given to the mortgagor or any person claiming under him. No prior or subsequent mortgagors or encumbrancers need be made parties. No testimony need be taken, no hearing had and no affidavits or other proof of title to the mortgage debt submitted. The mortgagee is entitled to the decree at any time after the recording of the mortgage and without regard to default. If there has been no default, the decree is entered prospectively. If no default occurs, it never becomes effective, but, should there be a default afterward occurring, the decree is enforced. *Ahren v. Ijams,* 158 Md. 412, 418. The Act applies only to Baltimore City and has been aptly described as a summary and peculiar proceeding prescribed by the Legislature. *Cronise v. Clark,* 4 Md. Ch. 403, 408.*

The right of an assignee of any part of the mortgage debt to a decree under the Act was established in *Richardson v. Owings,* 86 Md. 663.

The practice has arisen among many mortgage or other loan companies, in making mortgage loans on

* It is sometimes said that the Act creates a special or limited jurisdiction in the two Circuit Courts of Baltimore City or the decree is loosely referred to as a consent decree. Both of these points were decided in the negative in the early case of *Williams vs. Williams,* 7 Gill (Md.) 302, in which it was further stated, page 305, that the statute simply provides a summary mode of reaching the decree.

large buildings or other projects, the size of which are too large to be taken and held as a whole by individual or institutional investors, of splitting up the entire mortgage debt, and in lieu of issuing notes or bonds secured by the mortgage, to assign undivided interests therein to individual investors. Under the construction of the aforementioned statute in *Richardson v. Owings, supra,* any of these investors were entitled to apply for a decree for the sale of the mortgaged premises.

The Legislature evidently realized the inherent danger, not only to their fellow investors, but to the public welfare of the precipitate action of reckless holders of undivided interests in mortgages of insignificant amounts, in securing decrees under the peculiar remedy afforded by the statute. That the Legislature thought the condition one of paramount importance is shown from the preamble and legislative findings incorporated in the amendatory Act (see Appendix).

In the trial Court testimony was taken to substantiate the legislative findings of an emergency (Record pp. 34-97), which shows the following facts:

(1) That there is no market for large real estate in Baltimore City; (2) that partial assignments of mortgages are frequently made in the case of mortgages on large properties; (3) that the aggregate amount of such partial assignments runs into millions of dollars; (4) that these assignments are in the hands of thousands of investors scattered throughout Maryland and

nearby states, frequently in denominations as small as $50.00; (5) that this summary method of foreclosure sale confers upon small investors an opportunity to inflict enormous losses upon their co-investors through precipitating a sale of mortgaged property on a market where there are no bidders or buyers, in an ex parte proceeding and upon notice which is utterly inadequate to enable their co-investors to take any effective measures for their protection; (6) that this practice tended further to demoralize an already prostrate real estate market, the condition of which was of vital importance to savings banks, insurance companies and fiduciary institutions, and in fact, the entire public, and (7) that the Act was being taken advantage of by heedless investors.

The Court of Appeals of Maryland justified the legislative finding when it stated (Record p. 125): "We have no doubt that the Legislature gave expression to a generally recognized fact that an emergency in economic affairs existed."

IV

SPECIFICATION OF ERRORS

The Court of Appeals of Maryland erred in holding Chapter 56 of the Acts of 1933, Special Session, to be unconstitutional and void as in conflict with Section 10 of Article I of the Constitution.

V

ARGUMENT

SUMMARY OF THE ARGUMENT

The Petitioners' contention is that Chapter 56 of the Acts of 1933 does not impair the obligation of the mortgage contract, in that

POINT A

The assent contained in the mortgage expressly or by necessary implication contemplates *amendments or additions* to the original Act.

POINT B

The Act operates only upon the remedy and does not impair the substantive rights under the mortgage contract.

POINT C

An economic condition constituting an emergency existing (and continuing), the Act is a legitimate exercise of the police power of the State.

POINT A

THE ASSENT CONTAINED IN THE MORTGAGE EXPRESSLY OR BY NECESSARY IMPLICATION CONTEMPLATES *AMENDMENTS OR ADDITIONS* TO THE ORIGINAL ACT

Where the contract clause is invoked we believe this Court will determine for itself what the contract is and whether it has been impaired. *Funkhauser v. J. B. Preston Co.*, 290 U. S. 163.

The assent to the passing of a decree as the same appears in the mortgage (Record p. 5) is "in accord-

ance with Sections 720 to 732 inclusive of Chapter 123 of the Laws of Maryland, passed at the January Session 1898 or any *amendments or additions thereto.*" (Italics ours).

It would seem that the intention of the parties was that the assent was to be of such legal significance and effect as was given to it by the Act referred to, as amended or added to, at the time that the remedy was exercised, particularly when there were no existing amendments or additions to the Act which the parties could have had in mind at the time that the mortgage was executed. The Court of Appeals of Maryland declined to accept this construction and while admitting that at the time the language was incorporated in the mortgage there had been no amendments or additions to these sections of the Act, found that the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage. (Record p. 121). This we regard as unsound as it is not to be presumed that parties, in their choice of language in a formal instrument, will refer expressly to amendments or additions to a statute which do not exist, and that in using the language which they did, they must have had in contemplation future amendments or additions.

Stipulations in mortgages for a method of foreclosure created or regulated by statute have been construed by other Courts to refer to the remedy as existing at the time it was resorted to. *Scott et al. v. District Court et al.*, 15 N. D. 259; *State,*

etc. v. Circuit Court, (S. D. 1933) 249 N. W. 631. This construction of the assent would also be in accordance with the presumption, often entertained by this Court, that parties make their contracts with reference to the power of the State (within proper limits) to regulate the methods of procedure in actions thereon. *Henley v. Myers,* 215 U. S. 373. Such a presumption must of necessity arise in respect to stipulations for remedies given by statute, otherwise the parties by their contract can override the law-making power of the State.*

POINT B

THE ACT OPERATES ONLY UPON THE REMEDY AND DOES NOT IMPAIR THE SUBSTANTIVE RIGHTS UNDER THE MORTGAGE CONTRACT

In the opinion of the Court of Appeals it is said: ~~(R. pp. ——)~~

"We must bear in mind that this legislation deals solely with a remedy, and the Legislature

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**Mason v. Haile,* 12 Wheaton (25 U. S.) 370. In *Conkey v. Hart,* 14 N. Y. 22, in construing a statute abolishing distress for rent in its application to existing leases, stipulating for this remedy, the Court said, pages 29, 30, "In the view taken by the Supreme Court, the contract in substance contains a stipulation between these parties that this State shall continue in force the legal process of distraining for rent. If this is a subject on which parties can contract, and if their contracts when made become by virtue of the Constitution of the United States superior to the power of the Legislature, then it follows, that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated if the parties choose so to agree. * * * Every such stipulation is in its own nature conditional upon the lawful continuance of the process."

doubtless concluded that the remedies theretofore afforded for every fractional owner of a mortgage should be modified or changed so that the particular remedy could only be exercised by those mortgagees, singly or in combination, who controlled or represented 25 per cent. of the mortgage debt. It was doubtless brought to the legislative attention that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the acts in question. This was an evil found by the Legislature to exist, and the purpose of the classification was to diminish the evil by determining that this remedy should be only available to those holding at least 25 per cent. of the mortgage debt then unpaid.'' (Record p. 126).

These findings of the Court appear to describe a characteristic case for the appropriate exercise of the acknowledged power of the State to regulate the remedies for the enforcement of contracts. The suggestion that when a summary remedy is abolished or suspended, litigants must be left with some other remedy equally as summary, or that ''summary'' and ''coercive effect'', as applied to remedies, are synonymous, is a novel one. This Court, at an early date, stated that it was not necessary that the new or substituted or remaining remedy be as con-

venient or as expeditious as the old and although the new or remaining remedy may be less convenient than the old one and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Mr. Chief Justice TANEY in *Bronson v. Kinzie,* 1 HOWARD (42, U. S.) 311, 315.

While it has been stated that the remedy for the enforcement of a contract enters into the contract itself, the instances are limited to where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or, the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so. *Waggoner v. Flack,* 188 U. S. 595, 602.

The Courts below, in concluding that the legislation now under review impaired the obligation of the contract, relied upon the fact that the particular remedy under the Act of 1898 was expressly incorporated in the mortgage, and that the only remedies remaining to the respondents were antiquated or cumbersome. But it is evident that the language of the mortgage does not create a remedy but merely removes an obstacle to the exercise of a remedy already provided by the statute. No remedy flows from the assent. The remedy flows from the statute, which contains as a condition to its exercise the requirement of the mortgagors' assent. As to the contention that the mortgagors' remaining remedies are cumbersome,

it should be enough to say that the respondents still have available to them every remedy which is available to the ordinary litigant, in law or in equity, for the purpose of collecting a debt or enforcing a lien upon real property. If these remedies suffice for other litigants, they ought not to be held to be so unsubstantial or lacking in coercive power as to leave this type of mortgagees without effective and enforceable remedies for establishing their rights.

The various methods available to a mortgagee to enforce his rights of payment against the mortgaged property in equity were referred to in the opinion of the Court of Appeals of Maryland (Record p. 122). Some further discussion of these modes will be found in the opinion of the Circuit Court No. 2 of Baltimore City (Record p. 102 et seq.). The mortgagee always has the choice of whether he will proceed by bill in equity or by summary proceeding. *Ahrens v. Ijams,* 158 Md. 412, 417. The opinion of the Court of Appeals in this respect is not clear, in that, it conveys the impression that the holder of a partial interest in a mortgage is left with no method of procedure except in cooperation with others holding not less than 25% of the total mortgage debt. This is not the case, as the holder of any interest in the mortgage, no matter how small, may proceed by bill in equity for foreclosure without the cooperation or consent of any other holders of an interest in said mortgage. The restrictive provisions of the 1933 Act apply only to the summary proceedings.

POINT C

AN ECONOMIC CONDITION CONSTITUTING AN EMERGENCY EXISTING (AND CONTINUING), THE ACT IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE

We take it to be settled that the constitutional prohibition will not be so construed as to prevent a limited and temporary interposition with respect to the enforcement of mortgage contracts when an urgent public need, demanding relief, arises through economic causes, and that, therefore, the Court of Appeals of Maryland was in error when they stated (Record p. 175) that the constitutionality of the Act of 1933, Special Session, must be tested in the same way as if it had been passed in times of economic prosperity. The Court's opinion recognizes that the Legislature gave expression to a generally recognized fact that an emergency in economic affairs of the State existed at the time that the legislation was enacted and that this emergency continued to exist at the time of the entry of the decree is amply demonstrated by the testimony in the case. If the remedy was unusual, as much can be said of the conditions existing which it sought to alleviate and even though it be found that the Act in question in different times and under different conditions might be held to infringe too closely upon the constitutional prohibition to be upheld, yet in view of the emergency and the existence of the situation which it was designed to relieve, it seems that it was well within the protective power lodged in the State of

Maryland. *Home Building & Loan Asso. v. Blaisdell,* 290 U. S. 398; *W. B. Worthen Co. v. Thomas* 292 U. S. 426; *Block v. Hirsch,* 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman,* 256 U. S. 170; *Durham Realty Co. v. LaFetra,* 230 N. Y. 429.

The Court of Appeals of Maryland, in its opinion, made some mention of a power of sale which was also contained in this mortgage. The cause went up to said Court on an appeal from a decree entered under the Act of 1898, and the validity of Chapter 57 of the Acts of 1933, Special Session, attempting to regulate the exercise of these powers, was in no way involved or presented in either the lower or upper courts. It may be mentioned, however, that the power of sale is another form of summary, ex parte foreclosure authorized and regulated by statutes now codified as Article 66, Sections 6 to 10 inclusive of Bagby's Annotated Code of Maryland, 1924. The power of sale and its exercise by the mortgagee, its successors or assigns or by its or their attorney, is dependent entirely upon the statute for its validity. Independently of the statute, the power means nothing. It would, therefore, seem that the constitutionality of the amendatory legislation to this remedy would be governed by the same principles that are applicable to the legislation amending the Acts dealing with an assent to a decree.

CONCLUSION

The situation of holders of undivided interests in mortgages in Maryland and neighboring states is acute and demands relief. In order for them to protect themselves, it is essential that the foreclosure of large mortgages by holders of small interests therein be conducted upon reasonable notice to the mortgagors and other holders of interests in said mortgages, and in an orderly proceeding wherein the foreclosure decree is based upon proper proof of interest and default. The Maryland Legislature meets again during the year 1935 and without a construction of this statute by this Court, it will necessarily be handicapped in arriving at a proper solution of this pressing problem.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and further reviewing and reversing the decision in said case.

JAMES THOMAS,

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Counsel.

APPENDIX

Acts of the General Assembly of Maryland of 1898, Chapter 123, Section 720.

Article 4 of the Code of Public Local Laws of Maryland (1930 edition), entitled "Baltimore City", subtitle "Mortgages", Section 720.

720. In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in the said city, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises.

Acts of the General Assembly of Maryland, Special Session, 1933, Chapter 56.

AN ACT to add a new section to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), entitled "Baltimore City", sub-title "Mortgages",

said new section to be known as Section 720A and to follow immediately after Section 720 of said Article, relating to securing decrees under mortgages containing an assent to such decrees for a foreclosure sale.

WHEREAS, Under the aforesaid Section 720, as the same has been construed by the Court of Appeals of Maryland, a holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now secure a decree under the assent to such decree contained in such mortgage, and upon any default in such mortgage, the trustee named in said decree may foreclose the same, even though such foreclosure be against the wishes of the holders of the remainder of said debt secured by said mortgage; and

WHEREAS, By reason of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in Baltimore City, and any precipitate foreclosure would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of the investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title "Baltimore City," sub-title "Mortgages," said new section to be known as 720A and to follow immediately after Section 720, and to read as follows:

720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend, and any consent so given shall be as valid and effective for the purposes of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and having been passed upon by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved December 15, 1933.

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No. 441

In the Supreme Court of the United States

OCTOBER TERM, 1934

UNITED STATES MORTGAGE COMPANY and MORTGAGE GUARANTEE COMPANY, PETITIONERS,

vs.

MARY E. MATTHEWS and JOHN MATTHEWS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONERS

CLARENCE A. TUCKER,
JAMES THOMAS,
WILLIAM L. MARBURY, JR.,
Counsel for Petitioners.

TABLE OF CONTENTS.

	PAGE.
OPINIONS OF COURTS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REMEDIES FOR ENFORCING THE MORTGAGE LIEN IN MARYLAND	7
Foreclosure by Bill in Equity	8
Foreclosure by summary proceedings	10
SPECIFICATION OF ERRORS	14
ARGUMENT	14
Summary of the Argument	14
I. Chapter 56 of the Acts of 1933, Special Session, Does Not Impair the Obligation of the Mortgage Contract	14
Point A	
The Assent Contained in the Mortgage Expressly or by Necessary Implication Contemplates Amendments or Additions to the Original Act	15
Point B	
The Act Operates Only Upon the Remedy and Does Not Impair the Substantive Rights Under the Mortgage Contract	16
Point C	
An Economic Condition Constituting an Emergency Existing (and Continuing) the Act is a Legitimate Exercise of the Police Power of the State	32
II. Chapter 56 of the Acts of 1933, Special Session, Does Not Deny Respondents the Protection of the Laws	35
CONCLUSION	38

PAGE.

APPENDIX A 39

Acts of the General Assembly of Maryland of 1898, Chapter 123, Sections 720 to 732, Inclusive..... 39

Article 4 of the Code of Public Local Laws of Maryland (1930 Edition) Entitled "Baltimore City" subtitle "Mortgages", Section 720..... 39

Acts of General Assembly of Maryland, Special Session, 1933, Chapter 56..... 44

APPENDIX B 46

Article 66, Annotated Code of Maryland (1924 Edition), Entitled "Mortgages", Sections 6 to 10, Inclusive 46

Chapter 57 of the Acts of General Assembly of Maryland, Special Session, 1933..... 48

APPENDIX C 50

Summary Foreclosures of Mortgages under a Power of Sale Contained in the Mortgage..... 50

CITATIONS.

Statutes:

Chapter 56, Acts of 1933 (Special Session)..... 3-4, 13
Chapter 123, Acts of 1898, Secs. 720-732..... 3
Chapter 57, Acts of 1933 (Special Session)..... 13, 24
Article 16, Code of P. G. L. (1924 Ed.), Section 232... 8

Textbooks:

Cooley, Constitutional Limitations, 8th Ed..... 17, 32
Miller Equity Procedure (1897)..... 10, 12
Venable Syllabus on Law of Estate..... 10, 12
Kent, Commentaries 17

Cases:

Ahrens v. Ijams, 158 Md. 412, 417..... 8, 11, 12
Antoni v. Greenhow, 107 U. S. 769.....20, 25, 26, 32
Bronson v. Kinzie, 1 Howard 311, P. 315..... 18, 25
Bryant v. Zimmerman, 278 U. S. 63, 77..... 37
Conkey v. Hart, 14 N. Y. 22..... 31
Conley v. Barton, 260 U. S. 667, 681..... 17
Cronise v. Clark, 4 Md. Ch. 403, 408..... 12, 26

	PAGE.
Durham Realty Co. v. La Fetra, 230 N. Y. 429, 440...	29
Ettar v. Tacoma, 228 U. S. 148, 155.....	24, 25
Fourth National Bank v. Francklyn, 120 U. S. 747....	22, 26
Funkhauser v. J. B. Preston Co., 290 U. S. 163.....	15
Henley v. Myers, 215 U. S. 373.....	16
Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 429, 434	17, 32, 34
Louisville Gas Co. v. Coleman, 277 U. S. 32, 42.....	37
Mason v. Haile, 12 Wheaton (25 U. S.) 370.....	18, 32
Ogden v. Saunders, 12 Wheat, 212.....	17, 18
Owens v. Graetzel, 146 Md. 361.....	12
Penniman's Case, 103 U. S. 714, 720.....	20
People Ex Rel Brixton Operating Corp. v. La Fetra, 194 App. Div. (N. Y.) 523.....	27
People Ex Rel H. D. H. Realty Corp. v. Murphy, 194 App. Div. 530.....	27
Richardson v. Owings, 86 Md. 663.....	12
Scott et al. v. District Court et al., 15 N. D. 259.....	16, 30
State, etc. v. Circuit Court (S. D. 1933), 249 N. W. 631	16, 29
State Board of Tax Commissioners v. Jackson, 283 U. S. 527.....	37
Sturges v. Crowninshield, 4 Wheat 122.....	17, 18
Tennessee v. Sneed, 96 U. S. 69.....	19, 26
Waggoner v. Flack, 188 U. S. 595, 602.....	23, 25
Wampler v. LeCompte, 282 U. S. 172.....	36
Warehime v. Carroll County Building Assn., 44 Md. 512, 516	8, 12
Williams v. Williams, 7 Gill. (Md.) 302.....	11, 26
Woltz et al. v. Asheville Safe Deposit Co., 206 N. C. 239	30
W. B. Worthen Co. v. Thomas, 292 U. S. 426, 432.....	34

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I

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but was published in the Atlantic Reporter, Volume 173, page 903. It also appears on page 116 of the Record. The opinion of the Circuit Court No. 2 of Baltimore City is not officially reported; it was published in The Daily Record (Baltimore, Maryland) on the 23rd day of March, 1934, and it appears on page 97 of the Record.

II

JURISDICTION

The case is here on writ of certiorari granted by this Court on November 5, 1934, pursuant to Section

237 of the Judicial Code as amended by the Acts of February 13, 1925, Chapter 229, Section 1 (U. S. C. A., Title 28, Section 344 (b)). The nature of the case and the decision of the Court of Appeals of Maryland is such as to bring the case within the terms of the statutory provision aforesaid, in that the validity of a statute of the State of Maryland was assailed as unconstitutional and the Court of Appeals of Maryland held the same to be unconstitutional and void on the sole ground that it was in conflict with Section 10 of Article 1 of the Constitution of the United States.

III

STATUTORY PROVISIONS INVOLVED

The challenged statute is Chapter 56 of the Acts of the General Assembly of Maryland, Special Session 1933. This statute is claimed to be invalid because of its effect on a statutory remedy for the foreclosure of mortgages provided by Chapter 123 of the Acts of 1898. The relevant sections of these statutes are printed in full in Appendix A attached to this brief.

IV

STATEMENT OF THE CASE

The purpose of this proceeding is to review a decision of the Court of Appeals of Maryland, holding invalid Chapter 56 of the Acts of 1933, Special Session of the General Assembly of Maryland. That Act sought to restrict the use of a special statutory form of procedure for the foreclosure of mortgages to the holders of not less than a 25% interest in any mortgage. The Court of Appeals of Maryland held that

this legislation, in its retrospective operation, impaired the obligation of mortgage contracts in violation of Section 10 of Article 1 of the Constitution of the United States.

The procedure which the Act of 1933 was intended to regulate was provided by Chapter 123 of the Acts of 1898, Sections 720 to 732 inclusive, now codified as Sections 720 to 732 of Article 4 of the Code of Public Local Laws of Maryland, titled "Baltimore City", subtitled "Mortgages" 1930 Edition. Section 720 provides in part:

> In all cases of conveyances * * * wherein the mortgagor shall declare his assent to the passing of a decree for the sale * * *, it shall be lawful for the mortgagee, or his assigns, at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof * * * who shall thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages * * *.

There was no amendment of this section after its enactment until the passage of Chapter 56 of the Acts of 1933, Special Session, which provides in part as follows:

> In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by

the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this section, during the period this section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and ex parte remedies given under Section 720.

That the period of the emergency herein declared as a matter of legislative determination shall be the period of time from the date this act takes effect to the first day of June, 1935.

That this Act is declared to be an emergency law and necessary for the immediate preservation of the public health and safety, * * *.

On July 30, 1932, the Respondents, Mary E. Matthews and John Matthews acquired an undivided 500/2950 share in a certain mortgage dated July 30, 1925, from Walter H. Warner to Mortgage Guarantee Company, a Delaware corporation, on property located in Baltimore City (Record p. 8). This mortgage contained the following language (Record p. 5):

"And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City, for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto."

On December 22, 1933, seven days after the amendatory act became effective, the Respondents petitioned

the Circuit Court No. 2 of Baltimore City for a decree and the appointment of a trustee to make sale of the property (Record p. 2), under the Act of 1898 referred to in the mortgage, whereupon Petitioners, United States Mortgage Company, the then owner of the equity of redemption in the property covered by the mortgage, and Mortgage Guarantee Company, the holder of record, or the duly authorized representative of the holders of record of approximately 83% of the unpaid mortgage debt, appeared and were permitted to intervene in the proceedings, setting up the provisions of Chapter 56 of the Acts of 1933, Special Session, as a reason why the petition of the Respondents should not be granted (Record p. 10).

In the trial court testimony was taken to substantiate the legislative findings of an emergency (Record pp. 34-97) which tended to show the following facts:

(1) That there is no market for large real estate in Baltimore City; (2) that partial assignments of mortgages are frequently made in the case of mortgages on large properties; (3) that the aggregate amount of such partial assignments runs into millions of dollars; (4) that these assignments are in the hands of thousands of investors, scattered throughout Maryland and nearby states, frequently in denominations as small as $50.00; (5) that this summary method of foreclosure sale confers upon small investors an opportunity to inflict enormous losses upon their co-investors through precipitating a sale of mortgaged property on a market where there are neither bidders nor buyers, in an ex-

parte proceeding and upon notice which is utterly inadequate to enable their co-investors to take any effective measures for their protection; (6) that this practice tended further to demoralize an already prostrate real estate market, the condition of which was of vital importance to savings banks, insurance companies and fiduciary institutions and, in effect, the entire public; (7) that this remedy was being taken advantage of by heedless investors.

The evidence further tended to show that it was a practice of many mortgage or other loan companies, in making mortgage loans on large buildings or other projects, the size of which were too large to be taken and held as a whole by individual or institutional investors, to split up the entire mortgage debt, and in lieu of issuing notes or bonds secured by the mortgage, to assign undivided interests therein to individual investors.

The Circuit Court No. 2 of Baltimore City, in its opinion (Record p. 97) held Chapter 56 of the Acts of 1933, Special Session, to be unconstitutional and entered a decree for the sale of the mortgaged property. From this decree the Petitioners appealed to the Court of Appeals of Maryland, who held the Act to be unconstitutional and void on the ground that it conflicted with Section 10 of Article 1 of the Constitution of the United States (Record p. 116), although holding at the same time that the Act did not deprive the holders of less than a 25% interest in mortgages of the equal protection of the laws, for the reason that the classifi-

cation adopted by this legislation was reasonably adapted to meet "an evil found by the Legislature to exist", namely "that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interest of the large majority holders in a given mortgage would have their security and the opportunity of realizing the full amount of the mortgage seriously endangered" (Record p. 126). From the decree of the Court of Appeals of Maryland the Petitioners applied to this Court for a writ of certiorari, which was granted November 5, 1934. (Record p. 128).

REMEDIES FOR ENFORCING THE MORTGAGE LIEN IN MARYLAND

The several remedies available to a mortgagee to enforce his lien against the mortgaged property were referred to in the opinion of the Court of Appeals of Maryland (Record p. 122). Some further discussion of these modes will be found in the opinion of the Circuit Court No. 2 of Baltimore City (Record p. 102 et seq). To repeat here what is there said is thought unnecessary.

All foreclosure proceedings in Maryland fall into two categories:

1. By bill in equity wherein (a) strict foreclosure or (b) foreclosure by sale, may be decreed; and

2. Foreclosure by summary proceedings under (a) an assent to a decree contained in the mortgage (local to Baltimore City), (b) a power of sale authorized by

the mortgage, or (c), a sale upon breach of condition or happening of future event authorized by the mortgage or other instrument.

1. *Foreclosure by bill in equity*

The power to foreclose after default is one of the ordinary powers of a Court of Chancery in Maryland, existing independently of any assent of the mortgagor or of the provisions of the mortgage. *Ahrens v. Ijams,* 158 Md. 412, 417; *Warehime v. Carroll County Building Association,* 44 Md. 512, 516. The proceedings for foreclosures by bill are in conformity with the regular pleadings and practice in equity. They are commenced by filing an appropriate bill. The defendants are subpoenaed if within the jurisdiction, if not the suit is conducted as one in rem and is prosecuted on process by publication. After the answer is filed, if an issue is raised, evidence is taken. If the case is admitted or made out, the court passes a decree. So long as it was the practice to decree strict foreclosure, the decree fixed a time when the mortgage debt should be paid or brought into court and declared the right of redemption to be forever foreclosed if the money was not paid within the period fixed. But since the passage of the Act of 1785, Chapter 72, now codified as Section 232, Article 16, Code of Public General Laws (1924 Ed.), wherein a court of equity was authorized to decree that the property mortgaged, or so much thereof as might be necessary for the satisfaction of the mortgage debt and costs, should be sold, strict foreclosure has been practically supplanted by a decree to sell.

This decree directs that unless the mortgage debt with interest thereon until paid, and the complainant's costs to be taxed by the clerk, are paid or brought into court on or before a day fixed in the decree, then the property is to be sold. The decree appoints a trustee to make the sale and prescribes the course and manner of his proceeding. It further provides that the trustee shall give bond and shall give notice by advertisement of the time, place, manner and terms of sale and prescribes the manner in which the advertisement is to be made and fixes the terms of sale. At the time appointed for the sale, the trustee, in person, proceeds to the place fixed and makes sale in accordance with the terms of the decree and as advertised.

The property having been sold, the trustee makes a report of sale to the Court with an affidavit to its truth. So soon as the report is made, the court or the clerk passes an order that the sale be ratified and confirmed unless cause to the contrary be shown before a specified time. If no exceptions are made to the sale, or, if made and overruled, the court, on or after the day specified, passes an order of final ratification of the sale and the matter is then referred to an auditor to state an account, which is returned to the court. The court passes an order of ratification nisi on the auditor's account and after the expiration of a specified time, the same is finally ratified.

If it is sought to foreclose a mortgage in the United States Courts in this district, the substantial equivalent of this proceeding is the only remedy available to

the mortgagee. The procedure is neither more nor less burdensome than any other suit conducted in conformity with the regular pleadings and practice in equity.

For further treatment of the foreclosure of mortgages in Maryland by bill in equity, see MILLER, EQUITY PROCEDURE (1897) Section 445 et seq.; VENABLE, SYLLABUS ON LAW OF ESTATES, pages 214 to 220. Also pages 177 et seq.

2. *Foreclosure by summary proceedings*

The three methods of foreclosure of a mortgage by summary proceedings all owe their existence to statutes and their availability to mortgagees are dependent upon the assent of the mortgagor or the provisions of the mortgage.

(a) Under an assent to a decree contained in the mortgage.

This remedy is provided by Chapter 123 of the Acts of 1898, Sections 720 to 732, inclusive, now codified as Sections 720 to 732, inclusive, of Article 4 of the Publice Local Laws of Maryland, title "Baltimore City," sub-title "Mortgages," 1930 Edition. It is evident that the language of the mortgage is not intended to create a remedy but merely meets a condition precedent to the exercise of a remedy provided by the statute. The proceeding is commenced by a petition filed by the mortgagee and is entirely ex parte, and *no notice at any stage of the proceedings is required to be given to the mortgagor.* In order to obtain the decree it is

only necessary to file the mortgage and petition for the decree. No summons is necessary, no notice is required to be given to the mortgagor or to any person claiming under him. No prior or subsequent mortgagors or encumbrancers need be made parties, no testimony need be taken, no hearing had and no affidavits or other proof of title to the mortgage debt submitted. The mortgagee is entitled to the decree at any time after the recording of the mortgage and without regard to default. If there has been no default, the decree is entered prospectively. If no default occurs it never becomes effective, but should there be a default afterward occurring, the decree is enforced. *Ahrens v. Ijams,* 158 Md. 412, 418.

The usual practice is to draw the decree so as to fully prescribe the duties of the Trustee appointed to make the sale. Upon the occurrence of a default, the mortgaged property can be advertised at once and the Trustees bond and a statement of the mortgage claim may be filed at any time before the sale is made. The property having been sold, the Trustee makes a report of sale to the Court and the proceedings from this point to the close are in conformity with regular foreclosure proceedings.

It is sometimes said that the act creates a special or limited jurisdiction in the two Circuit Courts of Baltimore City or the decree is loosely referred to as a "consent decree." Both of these points were decided in the negative in the early case of *Williams v. Williams,* 7 Gill. (Md.) 302, in which it was further

stated, at page 305, that the statute simply provides a summary mode of reaching the decree.

This remedy has been aptly described as the summary and peculiar proceedings prescribed by the Legislature. *Cronise v. Clark,* 4 Md. Ch. 403, 408, and in *Ahrens v. Ijams, supra,* page 418, it was said "there must be a strict compliance with the provisions of a statute creating a remedy of such summary nature and its operation should not be enlarged beyond the limits set by the legislative intention." *Owens v. Graetzel,* 146 Md. 361. The assent contained in the mortgage confers no jurisdiction upon the court to pass the decree. Its jurisdiction is dependent entirely upon the continuing existence of the statute. *Warehime v. Carroll County Building Association,* 44 Md. 512, 516.

The right of an assignee of any part of the mortgage debt to a decree under the act was established in *Richardson v. Owings,* 86 Md. 663.

For further treatment of the foreclosure of mortgages in Maryland under an assent to a decree, See MILLER, EQUITY PROCEDURE (1897) Section 474 et seq.; VENABLE, SYLLABUS ON LAW OF ESTATES, pages 222 to 224. Also see Annotations to Sections 720 to 732 inclusive of the Act of 1898, in Article 4 of the Code of Public Local Laws of Maryland (1930 Edition) entitled "Baltimore City", sub-title "Mortgages" under the respective sections.

(b) Foreclosure under power of sale authorized by the mortgage.

The Court of Appeals of Maryland, in its opinion below made some mention of the power of sale which was contained in the mortgage. The case at bar went up to that court on an appeal from a decree entered under the Act of 1898 and involves the validity of Chapter 56 of the Acts of 1933, Special Session. The validity of Chapter 57 of the Acts of 1933, Special Session, attempting to regulate the exercise of powers of sale is in no way involved in this case and was not presented in either the lower or upper courts. It may be mentioned, however, that this remedy is another form of statutory ex parte foreclosure authorized and regulated by statutes, now codified as Article 66, Sections 6 to 10 inclusive of the Code of Public General Laws (1924 Ed.). These sections are printed in Appendix B attached to this brief.

As some insight into the character of this remedy might be helpful in determining the issues presented in this case, a short summary of the procedure thereunder is also given in Appendix C. The power of sale and its exercise by the mortgagee, his successors or assigns, or by his or their attorneys, is dependent entirely upon statute for its validity. Independent of the statute the power means nothing. It would, therefore, seem that the constitutionality of the amendatory legislation to this remedy would be governed by the same principles that are applicable to the legislation amending the act dealing with an assent to a decree.

(c) A sale upon breach of condition authorized by the mortgage or other instrument.

The statute regulating the exercise of this remedy is in no wise involved in the present case and comment thereon could not be helpful.

V

SPECIFICATION OF ERRORS

The Court of Appeals of Maryland erred in holding Chapter 56 of the Acts of 1933, Special Session, to be unconstitutional and void as in conflict with Section 10 of Article I of the Constitution.

VI

ARGUMENT.

SUMMARY OF THE ARGUMENT

I. Chapter 56 of the Acts of 1933, Special Session, does not impair the obligation of the mortgage contract, in that

POINT A

The assent contained in the mortgage expressly or by necessary implication contemplates *amendments or additions* to the original Act.

POINT B

The Act operates only upon the remedy and does not impair the substantive rights under the mortgage contract.

POINT C

An economic condition constituting an emergency existing (and continuing), the Act is a legitimate exercise of the police power of the State.

II. Chapter 56 of the Acts of 1933, Special Session, does not deny respondents the equal protection of the laws.

I.

POINT A

THE ASSENT CONTAINED IN THE MORTGAGE EXPRESSLY OR BY NECESSARY IMPLICATION CONTEMPLATES *AMENDMENTS OR ADDITIONS* TO THE ORIGINAL ACT

Where the contract clause is invoked we believe this Court will determine for itself what the contract is and whether it has been impaired. *Funkhauser v. Preston Co.*, 290 U. S. 163.

The assent to the passing of a decree as the same appears in the mortgage (Record p. 5) is "in accordance with Sections 720 to 732 inclusive of Chapter 123 of the Laws of Maryland, passed at the January Session 1898 or any *amendments or additions thereto.*" (Italics ours). It would seem that the intention of the parties was that the assent was to be of such legal significance and effect as was given to it by the Act referred to, as amended or added to, at the time that the remedy was exercised, particularly when there were no existing amendments or additions to the Act which the parties could have had in mind at the time that the mortgage was executed.

The Court of Appeals of Maryland declined to accept this construction and while admitting that at the time the language was incorporated in the mortgage there had been no amendments or additions to these sections of the Act, found that the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage. (Record p. 121).

This we regard as unsound as it is not to be presumed that parties, in their choice of language in a formal instrument, will refer expressly to amendments or additions to a statute which do not exist. In using the language which they did, they must have had in contemplation future amendments or additions.

Stipulations in mortgages for a method of foreclosure created or regulated by statute have been construed by other courts to refer to the remedy as existing at the time it was resorted to. *Scott et al. v. District Court et al.*, 15 N. D. 259; *State, etc v. Circuit Court* (S. D. 1933), 249 N. W. 631. This construction of the assent would also be in accordance with the presumption, often entertained by this Court, that parties make their contracts with reference to the power of the State (within proper limits) to regulate the methods of procedure in actions thereon. *Henley v. Myers*, 215 U. S. 373.

POINT B

THE ACT OPERATES ONLY UPON THE REMEDY AND DOES NOT IMPAIR THE SUBSTANTIVE RIGHTS UNDER THE MORTGAGE CONTRACT

In the opinion of the Court of Appeals it is said: (Record p. 126):

> "We must bear in mind that this legislation deals solely with a remedy,

There are many decisions of this Court upholding as mere changes in remedies legislation assailed under the contract clause; so also are there decisions invalidating legislation on the ground that attempted

changes in remedies impaired substantial rights. See *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, 429-434. The rationale of these decisions is not always clear and the principles enunciated appear to compete with, rather than to complement one another. cf. Mr. Justice McKenna in *Conley v. Barton,* 260 U. S. 677, 681. Chancellor Kent found it possible to assert that the better rule does not permit the modification or abrogation of any remedy available to the parties when the contract is made. See Commentaries, I, p.*419, note a. On the other hand Judge Cooley said (Constitutional Limitations, 8th ed., 585-587):

> "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy."

Choice between these apparently conflicting opinions must rest upon the determination of an issue raised as long ago as *Ogden v. Saunders,* 12 Wheat, 212, namely, whether the distinction taken in *Sturges v. Crowninshield,* 4 Wheat. 122, between the obligation of a contract and the remedy given by the legislature to enforce the obligation, is a distinction of substance or one

merely of form. Chief Justice MARSHALL expressed his view on this question with his accustomed power in *Ogden v. Saunders, supra* (p. 349), where he declared that the distinction was one of substance. It is evident that a majority of the court concurred in these views for they find immediate application in *Mason v. Haile,* 12 Wheat. 370, where legislation releasing a debtor from imprisonment was held a good defense to a suit on his bond.

The extent to which the principles enunciated by Chief Justice MARSHALL had found their way into the body of our constitutional law was considered in the opinion delivered by Chief Justice TANEY in *Bronson v. Kinzie,* 1 Howard 311, p. 315 where he said:

> "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * It must reside in every state to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is

produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

* * * * *

"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Tennessee v. Sneed*, 96 U. S. 69, a writ of mandamus was sought to compel acceptance in payment of taxes, of notes issued by the Bank of Tennessee pursuant to a charter expressly providing that such notes should be accepted in payment of taxes. Long after the bank was chartered the legislature afforded by statute a remedy of mandamus, but thereafter repealed this statute, at the same time prohibiting tax collectors from accepting the notes in payment of taxes. This last legislation further provided that any taxpayer tendering such notes must first pay the tax under protest in other specified currency and thereafter institute suit to recover the tax so paid. The act was sustained as against the objection that it impaired the obligation of contract, this Court after reviewing prior decisions saying (p. 74):

> "If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired. *Bronson v. Kinzie, supra; Huntzinger v. Brock,* 3 Grant's Cases (Pa.), 243; *Evans v. Montgomery,* 4 Watts & S. (Pa.) 218; *Read v. Frankfort Bank,* 23 Me. 318.
>
> The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right. *Bronson v. Kinzie, supra.*"

So in *Penniman's Case,* 103 U. S. 714, 720 where an act abolishing imprisonment for debt was sustained as against the attack of one who had obtained a judgment prior to its passage this Court said:

> "The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

Perhaps one of the most illuminating opinions delivered by this Court on the subject under consideration is that of Chief Justice WAITE in *Antoni v. Greenhow,* 107 U. S. 769. There a contract between the State of Virginia and its bondholders required the acceptance of coupons in payment of taxes. When the contract

was made the writ of mandamus was available to the taxpayer. Thereafter legislation was enacted prohibiting the acceptance of these coupons in payment of taxes, abrogating the remedy of mandamus, and prescribing a remedy under which the taxpayer, after having first paid the tax in other specified currency and having tendered the coupons to the court, was required to submit to the determination of a jury the question as to the genuineness of the coupons. The burden of paying the costs of this proceeding was placed upon the taxpayer. This legislation was held not to impair the contract, this Court saying (p. 774):

> "It cannot be denied that, as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge, and enforcement.' *Walker v. Whitehead,* 16, Wall. 314, 317. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the legislative power of the States over the obligation of contracts was suggested by Chief Justice Marshall in *Sturges v. Crowninshield,* 4 Wheat. 122, and has been uniformly acted on since. *Mason v. Haile,* 12 Wheat. 370; *Bronson v. Kinzie,* 1 How. 311; *Von Hoffman v. City of Quincy,* 4 Wall. 535; *Drehman v. Stifle,* 8 id. 595; *Gunn v. Barry,* 15 id. 611; *Walker v. Whitehead,* 16 id. 314; *Terry v. Anderson,* 95 U. S. 628; *Tennessee v. Sneed,* 96 id. 69; *Louisiana v.*

Pilsbury, 105 id. 278. As was very properly said by Mr. Justice Swayne in *Von Hoffman v. City of Quincy, ubi supra*, 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution and to that exetent void.' p. 553. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge. *Jackson v. Lamphire*, 3 Pet. 280; *Terry v. Anderson, ubi supra*. We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. *Munn v. Illinois*, 94 U. S. 113. We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the Constitution."

In *Fourth National Bank v. Francklyn*, 120 U. S. 747, statutes claimed to form a part of a contract, authorized collection from stockholders of the debts of a corporation. By subsequent legislation these statutes were modified "by abolishing the right to take the person of a stockholder for the debt of a corporation; by substituting for the taking of his property on attach-

ment and execution against the corporation, a new form of remedy by action for debt against him upon a judgment obtained against the corporation; and by authorizing him, when so sued, either in equity or at law, to make any defense that the corporation might have made." This Court sustained the latter legislation against the claim that it impaired the obligation of a contract saying, through Mr. Justice GRAY (p. 755):

> "As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment. *Hawthorne v. Calef*, 2 Wall. 10; *Penniman's Case*, 103 U. S. 714; affirming 11 R. I. 333; *Ogden v. Saunders*, 12 Wheat. 213, 262, 349; *Webb v. Den*, 17 How. 576; *Curtis v. Whitney*, 13 Wall. 68; *Tennessee v. Sneed*, 96 U. S. 69."

More recently we find Mr. Justice PECKHAM, speaking for this Court in *Waggoner v. Flack*, 188 U. S. 595 saying (p. 602):

> "What particular remedy then existed by which the State might enforce the obligations of the contract made by the purchaser is not material in this aspect of the case. It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing

so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

And more recently still in *Ettar v. Tacoma,* 228 U. S. 148, through Mr. Justice LURTON, this Court said (p. 155):

> "Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority."

It has been shown that the remedy claimed by Respondents flows from a statute in force at the time when the contract was made. Chapter 56 of the Acts of 1933, Special Session, clearly attempts to deny to the Respondents and others in a similar position, i. e. holders of less than a 25% interest in a mortgage, the right to the remedy provided by the Act of 1898, under an assent to a decree. In other words, in the broadest sense and taking into consideration Chapter 57 of the Acts of 1933, Special Session, regulating the exercise of the power of sale contained in the mortgage, it was the purpose of the Legislature to deny to holders of less than a 25% interest in any mortgage, the right to pursue the peculiar summary proceedings afforded by the statutes for the foreclosure of mortgages. It has also

been shown, however, that there remains to the Respondents and to other mortgagees in like position other remedies in equity for enforcing the mortgage lien, and the question resolves itself into whether the remedy, or remedies, remaining to the Respondents, meet the requirements established by the decisions of this Court.

As has been heretofore pointed out, the test which the remaining remedies must meet, has been phrased differently in different decisions of this Court, but there is no reason why each of the tests cannot be applied to the remaining remedy in this instance. For instance, is the remedy so burdened with conditions and restrictions as to make it hardly worth pursuing? *Bronson v. Kinzie, supra.* Is the remedy effective and enforceable and fairly sufficient to serve its purpose? *Waggoner v. Flack, supra.* Is the remedy substantial? *Ettar v. Tacoma, supra.* Is the remedy adequate and efficacious for its purpose? *Antoni v. Greenhow, supra.*

In reply to these queries, it may be said that the remedy is one which is given in courts of chancery of the State of Maryland for the foreclosure of all mortgages independently of any assent of the mortgagor or the provisions of the mortgage. It may also be said that the equitable remedy which is available to the Respondents is the usual remedy, and in many instances the only remedy, available to the ordinary litigant in equity. It is the only remedy available to a mortgagee seeking to foreclose a mortgage in the District Court of the United States for the District of

Maryland. Can a remedy be held to be insufficient from a constitutional standpoint under the contract clause when it is the only remedy afforded for the foreclosure of mortgages in the federal court of this District? The Respondents have available to them every remedy which is available to the ordinary litigant at law or in equity for the purpose of collecting a debt or enforcing a lien upon real property. If these remedies suffice for other litigants, they ought not to be held to be so unsubstantial or lacking in coercive power as to leave mortgagees without effective and enforceable remedies for establishing their rights.

It should not be overlooked that the remedy, of which the Respondents are temporarily deprived, was intended to supplement rather than supersede existing remedies; that it was intended to provide a summary mode of reaching a foreclosure decree, *Williams v. Williams,* 7 Gill. 302, 305, and that this "summary and peculiar proceeding prescribed by the Legislature," *Cronise v. Clark,* 4 Md. Ch. 403, has no bearing upon the mortgage debt or the substantial obligations of the contract but was intended to be entirely remedial. So considered, it would seem that the clear implication of such decisions as *Tennessee v. Sneed,* 96 U. S. 769, *Antoni v. Greenhow,* 107 U. S. 769, and *Fourth National Bank v. Francklyn,* 120 U. S. 747, heretofore cited, tends to support the validity of regulatory legislation of this character.

When we turn from the decisions of this Court to those of State tribunals, we find such legislation gen-

erally sustained. In *People Ex Rel Brixton Operating Corp. v. La Fetra,* 194 App. Div. (N. Y.) 523, the court sustained an act of the New York legislature abrogating summary remedies available to landlords in New York City, and held that such legislation could be applied to existing leases. The decision was plainly not based upon the existence of an emergency for in *People Ex Rel H. D. H. Realty Corp. v. Murphy,* 194 App. Div. 530, the same court condemned legislation limiting the substantive rights of landlords under similar leases. The reasoning of the Court appears from the following quotation: (525, 527-528)

> "Appellant contends that inasmuch as the remedy by summary proceeding was given when the lease was made, it was not competent for the Legislature to withdraw it as to existing contracts. In *People ex rel. H. D. H. Realty Corp. v. Murphy* (*supra*) we are expressing the opinion that the Legislature could withdraw or modify this remedy at will provided it left another adequate remedy for recovering the possession of the property. The learned counsel for the appellant argues the point somewhat more at length than it was argued in the other case and cites additional authorities but he cites none which we regard as entitling a party to a contract to *the precise remedy* for its violation or enforcement that was afforded at the time the contract was made, and we understand the rule now to be that a *statutory* remedy may be modified or withdrawn and that any remedy may be modified or changed so long as rights secured by contracts are not substantially impaired and some adequate remedy remains. (*Van Rensselaer v. Snyder,* 13 N. Y. 299; *Conkey v. Hart,* 14 id. 22;

Edwards v. Kearzey, 96 U. S. 595; *Gilman v. Tucker,* 128 N. Y. 190; *Laird v. Carton,* 196 id. 169; *Lazarus v. Metropolitan Elevated R. Co.,* 145 id. 581; *Story v. Furman,* 25 id. 214; *Fourth Nat. Bank v. Francklyn,* 120 U. S. 747; *Pittsburg Steel Co. v. Baltimore Eq. Soc.,* 226 id. 455; *McGahey v. Virginia,* 135 id. 662; *Henley v. Myers,* 215 id. 373; *Cooley Const. Lim.* (7th ed.) 411. See, also, *Southwick v. Southwick,* 49 N. Y. 510). The authority, however, of the Legislature to change the remedy does not authorize the substitution of a remedy by which a party may not recover what he was entitled to recover under the contract and the laws existing when it was made. This is well illustrated by *McCracken v. Hayward,* (43 U. S. (2 How.) 608). * * *

"Although broad language was there used which might indicate that a party was entitled to the particular remedy existing at the time of contracting, it must be read in the light of the prior admission in the opinion that it was left to the States to prescribe and shape the remedy. That opinion and like doctrine in other cases have not been regarded as limiting the authority of the Legislature with respect to changing statutory remedies; and in respect to such remedies, at least, the general rule is that contracts are deemed to have been made subject to legislation changing the remedy for the enforcement thereof. (*Van Rensselaer v. Snyder, supra; Conkey v. Hart,* 14 N. Y. 22; *Guild v. Rogers,* 8 Barb. 502; *Stocking v. Hunt,* 3 Den. 274; *Laird v. Carton, supra.*)"

On appeal it was held that the abrogation of summary remedies was but a part of a broader scheme of emergency legislation which must stand or fall to-

gether. For this reason the Court of Appeals elected to place its affirmance on a broader ground than that chosen in the court below. However in the opinion of Judge POUND there appears the following statement (*Durham Realty Co. v. La Fetra,* 230 N. Y. 429, 440) (p. 440):

> "We would not hesitate to say that the legislature might repeal or suspend in whole or in part the remedy of summary proceedings for the possession of real property, provided by the Code of Civil Procedure. The landlord has no vested or contractual property right in any particular form of remedy so long as he is permitted effectively to recover possession of his real property, and the only effect of the law in question is temporarily to deprive the landlord of the summary remedy given by the statute, except in certain cases. A general act abolishing such remedy would not impair the obligation at the contract (*Conkey v. Hart,* 14 N. Y. 22)."

In the few cases which have arisen the courts have not hesitated to apply this doctrine to legislation relating to mortgage foreclosures. In *State v. Circuit Court,* — S. D. —, 249 N. W. 631, the Supreme Court of South Dakota considered Chapter 135 of the Acts of 1933 of South Dakota, which provided in effect that upon the commencement of any advertising under the power of sale contained in any mortgage, the mortgagee might appear and by petition require the mortgagor to foreclose by action, which was a more tedious remedy. The appellant claimed the Act unconstitutional, in that the remedy being part of the obligation

of the contract, it was immune from change. The Court upheld the constitutionality of the legislation, stating that whether the power of sale in the mortgage was only a naked power or a power coupled with an interest, the fact remained that the practical and only purpose of the power was to give to the mortgagee a remedy to enforce the real obligation of the contract, that is, to subject the security to the payment of the debt; that as a power of sale could be exercised only in the manner prescribed by law, there was necessarily reserved to the State the power to control and regulate the exercise of that remedy. To the same effect is *Scott et al. v. District Court et al.*, 15 N. D. 259, and *Woltz et al. v. Asheville Safe Deposit Co.*, 206 N. C. 239.

In the courts below emphasis was laid upon the fact that the employment of the remedy provided by the Act of 1898 was *assented to* in the mortgage, and that this served to make the Respondents' right to pursue its remedy a part of the obligation of the contract, bringing it within constitutional protection. But it is evident that the *assent* in the mortgage does not create a remedy but merely removes an obstacle to the exercise of a remedy already provided by the statute. The assent to the decree in the mortgage is necessary in order that the mortgagee may avail himself of the remedy provided by the statute. The remedy, however, flows from the statute and not from the assent.

Furthermore it has been long since settled that the parties may not stifle the State's power to regulate

remedies by stipulating for a specific remedy. Thus in *Conkey v. Hart*, 14 N. Y. 22, a statute abolishing distress for rent was upheld in its application to existing leases stipulating for this specific remedy. The Court said (pp. 29, 30):

> "In the view taken by the supreme court, the contract in substance contains a stipulation between these parties that this state shall continue in force the legal process of distraining for rent. If this is a subject on which parties can contract, and if their contracts when made become by virtue of the constitution of the United States superior to the power of the legislature, then it follows that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its own nature conditional upon the lawful continuance of the process. The state is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe; and their continuance is not the subject of contract between private parties. In truth it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter, or resort to any other legal remedy, and the second is, that in cases of distress the lessee waives the exemption

> of certain property from the process, which by law was exempted. This waiver of exemption was undoubtedly the substantial thing, which the parties had in view; but yet, perhaps, their language cannot be confined to this object, and it may therefore be proper to consider the contract as if it had been their clear purpose to preserve this legal remedy, even if the legislature should think fit to abolish it. In that aspect of it the contract was a subject over which they had no control."

See COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed. p. 591, and cf. *Mason v. Haile,* 12 Wheat. 370.

There is substantial basis, therefore, for the contention that the legislation here assailed is such as might be justified under normal conditions. But, as this Court well knows, extraordinary conditions prevailed when the Legislature acted, and still prevail today. Their significance will appear from the discussion which follows.

POINT C

AN ECONOMIC CONDITION CONSTITUTING AN EMERGENCY EXISTING (AND CONTINUING), THE ACT IS A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE

Much of the evidence in the record was adduced in an attempt to impugn the motives of the Legislature and is clearly irrelevant, *Antoni v. Greenhow,* 107 U. S. 769; *Home Bldg. & L. Assn. v. Blaisdell,* 290 U. S. 398, but there is enough to show that the finding contained in the legislative preamble was amply justified. The existence of an emergency in the economic affairs of the State of Maryland is, as observed by the Court of

Appeals, a generally recognized fact (Record p. 125). This emergency produced many unwholesome practices, and none more destructive than that which the challenged legislation sought to check. For this practice tended to prolong and intensify the very emergency which made it possible.

By reason of the chaotic condition of the real estate market in Baltimore City, large properties cannot bring anything like their value when offered at foreclosure sale (Record pp. 40, 55). Foreclosure proceedings thus result in ruin to debtor and creditor alike. But this very threat of ruin to the creditor gives a powerful weapon to the holder of a small fractional interest in a mortgage. The menace of the holder of the small interest is intensified by the summary remedy available under the Act of 1898, the exercise of which the Legislature has sought to regulate. For, prior to Chapter 56 of the Acts of 1933, Special Session, the holder of a minute interest in a mortgage was able to obtain a decree for the sale of property without the consent, co-operation or knowledge of any interested party. Furthermore, any loss which might otherwise result to the aggressor from a forced sale could be minimized or eliminated by controlling the choice of a trustee to make sale of the property (Record p. 54).

At the time when the Legislature acted, abuses of this remedy were apparent and thus it is that we find the Court of Appeals saying (Record p. 126):

"It was doubtless brought to the legislative attention that under the provisions of the existing

law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the Acts in question."

Manifestly, continuance of such abuses would have further depressed the market for real estate and thus injured the interest of trust estates, insurance companies, savings banks and other similar public institutions (Record pp. 55, 56).

At the last term of this Court the relation of the existence of an emergency to the power of the State to regulate contracts in the public interest was carefully considered, and in *Home Bldg. Assn. v. Blaisdell,* 290 U. S. 398, it was determined that the States have the power, without violation of the Federal Constitution, to meet a paramount public need by regulating remedies available to mortgagees even though the result is partially to modify the substantive rights of the parties. The limitations surrounding that doctrine were clearly stated in *W. B. Worthen Co. v. Thomas,* 292 U. S. 426, 432.

The application of these principles to the case at bar cannot be in doubt. The necessity for a limited and temporary interposition with respect to the enforcement of the respondent's contract clearly appears from the legislative finding, the testimony produced at the hearing below, and the opinion of the Court of Ap-

peals. The reasonableness of the relief extended is equally apparent and is also attested by the Court of Appeals in sustaining this legislation against the objection now to be considered, that it contravened the Fourteenth Amendment.

II

The contention was advanced below that the legislation here assailed denies respondents the equal protection of the laws guaranteed by the Fourteenth Amendment. This contention was rejected by the Court of Appeals for reasons stated as follows (Record p. 126):

> "We must bear in mind that this legislation deals solely with a remedy, and the Legislature doubtless concluded that the remedies theretofore afforded for every fractional owner of a mortgage should be modified or changed so that the particular remedy could only be exercised by those mortgagees, singly or in combination, who controlled or represented 25% of the mortgage debt. It was doubtless brought to the legislative attention that under the provisions of the existing law the holders of minute fractions of a mortgage were making use of its provisions in cases where the real and substantial interests of the large majority holders in a given mortgage would have their security, and the opportunity of realizing the full amount of the mortgage, seriously endangered. This being in the legislative mind is demonstrated by the preamble of the Acts in question. This was an evil found by the Legislature to exist, and the purpose of the classification was to diminish the evil by determining that this remedy should be only available to those holding at least 25% of

> the mortgage debt then unpaid. The classification thus made would seem clearly to have direct relation to the purpose which the Legislature had in mind, and which we cannot say was arbitrary or fanciful."

It is submitted that the decision below was clearly right. In *Wampler v. Le Compte,* 282 U. S. 172, this Court sustained an act of the General Assembly of Maryland denying to riparian owners having less than a certain length of shore frontage the privilege of erecting a ducking blind. In sustaining this legislation against the challenge that it denied the small riparian owner the equal protection of the laws, this Court, speaking through Mr. Justice BRANDEIS, said, p. 174:

> "The provision which prohibits placing a blind within 250 yards of the land of an adjoining owner without securing his consent, is a necessary incident of the preferential right conferred upon riparian owners. See *Sheehy v. Thomas,* 155 Md. 688. There was obviously no intention to discriminate in favor of persons having a large water frontage; for the consent provision enables owners of small frontages to join in erecting blinds spaced the requisite distance apart."

The analogy to the present case seems clear. The classification in that law was based on the amount of shore frontage owned. It is true that the classification bore an obvious relation to a legitimate object of legislative regulation, that is to say, the conservation of wild life and the protection from injury of those engaged in the sport of shooting ducks. The fact remains, however, that the classification did deprive the small shore

front owner of a privilege extended to the owner of the larger frontage.

There are other instances where legislation establishing classes based upon similar differences has been sustained. As Mr. Justice VANDEVANTER said in sustaining legislation of the State of New York regulating secret societies having more than twenty members *Bryant v. Zimmerman,* 278 U. S. 63, 77:

> "Classification based on numbers is not necessarily unreasonable. There are many instances in which it has been sustained."

See a note to the dissenting opinion of Mr. Justice BRANDEIS in *Louisville Gas Co. v. Coleman,* 277 U. S. 32, 42, and cf. *State Board of Tax Commissioners v. Jackson,* 283 U. S. 527.

These illustrations, it is submitted, are sufficient to show that the Legislature may classify and deny to a small group a privilege extended to a larger group or vice versa, wherever such a classification bears a reasonable relation to a proper legislative end. Applying this test to Chapter 56 of the Acts of 1933, Special Session, 1933 there can be no question that the classification therein established bore a reasonable relation to the legislative object. The legislative object was to prevent the abuse of the remedy afforded by the Act of 1898. That object was obtained by requiring that the holders of an interest of not less than 25% of a mortgage deed join in any attempt to invoke that remedy. Without this classification the Legislature would face the alternative either of denying the

remedy entirely unless the entire mortgage interest were represented, a practical impossibility in many cases, or of permitting the existing abuses to go unregulated.

We submit therefore that the classification created by the Act is reasonable and that the respondents were not deprived of the equal protection of the laws within the meaning of the 14th Amendment.

CONCLUSION.

We have sought to show that Chapter 56 of the Acts of 1933, Special Session, is an exercise of the power reserved to the States to regulate the remedy for the enforcement of contracts and should be sustained without regard to the existence of an emergency. We have further sought to show that this legislation may be sustained upon the principles heretofore laid down by this Court as reasonably adapted to meet a paramount public need arising out of an emergency in the economic affairs of the State of Maryland. For these reasons it is submitted that the Court of Appeals of Maryland erred in striking down this legislation as in conflict with the Federal Constitution.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX A

ACTS OF THE GENERAL ASSEMBLY OF MARYLAND OF 1898, CHAPTER 123, SECTIONS 720 TO 732, INCLUSIVE.

ARTICLE 4 OF THE CODE OF PUBLIC LOCAL LAWS OF MARYLAND (1930 EDITION), ENTITLED "BALTIMORE CITY," SUB-TITLE "MORTGAGES", SECTION 720.

720. In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in the said city, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises.

721. The trustee or trustees so appointed, after having given bond with security, may, after the arrival of the period limited by the decree for a sale, sell, agreeably to the terms of said decree, the mortgaged property or any part thereof; the mortgagees, their executors, administrators or assigns, if the mortgage claim shall have been assigned before such sale, or their duly constituted agent or attorney, after the arrival

of the period aforesaid, verifying by their oath a statement of the amount of said mortgage claim remaining due, before the Judge of said court or before any Justice of the Peace of this State, the official character of any Justice of the Peace for any county being certified under his official seal by the Clerk of the Circuit Court for the county where the affidavit is made, where the affidavit is made outside of the City of Baltimore, or before any person outside of this State authorized to take acknowledgments of deeds; and such statement shall be filed in said court.

722. Such sales and the conveyances thereupon shall have the same effect, if finally ratified by said court, as if the same had been made under decrees between the proper parties in relation to the mortgages, and in the usual course of said court.

723. The trustee or trustees shall report the sales to the court for its consideration and ratification or rejection; and such orders shall pass therein touching such ratification as are usual on sales of mortgaged property in said court.

724. Any allegations may be made, and proof under the orders of the said court exhibited, and a trial of the allegations had as the court shall prescribe, to show that the sales ought not to have been made.

725. The said court, upon being satisfied of the truth of said allegations, shall reject and set aside the sale, and in such case no part of the costs or expenses or trustee's commission, if any such commission be claimable, in relation to the said sales, shall be chargeable upon said property, or the mortgagors, their heirs, executors, administrators or assigns, but shall be wholly chargeable against the persons at whose in-

stance or for whose benefit the said sales shall have been proposed to be made.

726. The clerk of said court shall file and record the said decrees, and docket the cases of the application therefor; and in the said decree and to be recorded therewith, shall file a copy of the mortgage upon which the same was rendered, and shall be entitled in the usual fees for such services.

727. Any entry on the docket of said court by the person entitled to assign the said mortgage claim, of the use and benefit of said decrees, shall have the same effect as assignments, and conveyances of the said mortgage interests, to have effect and precedence from the time of their respective entries; and the said entries shall not be made without an order or direction in writing, to be acknowledged before the Judge of said court, or a Justice of the Peace, by the persons purporting to sign the same, and filed and recorded by said clerk.

728. The duly authorized entries upon the docket of said court, of the satisfaction of said decrees, and the discharge of said mortgage claims, made by the persons entitled to receive said claims, shall have the same effect to discharge the mortgaged property of said mortgage, and all liens thereunder, as any conveyances by the parties interested in such claims, and the holders of the legal estate and interests therein, if competent to convey, could have at law, or in equity; but such entries shall not be made without an order or direction in writing, acknowledged by the persons purporting to have signed the same, before the Judge of said court, or a Justice of the Peace, and filed by the clerk of said court; and the entries shall refer to such orders or directions, and the names of the persons aforesaid; and

said order and directions shall be recorded in said court with said decrees.

729. The said court may, at its discretion, from time to time, appoint any other trustee or trustees in place of those appointed by the decree; and the proceeds of such sales shall be accounted for, to, and distributed by, said court, in the manner usual in cases of sales under decrees of said court.

730. Any mortgagee of property in the City of Baltimore, his assignee or executor, where a power to sell is contained in the mortgage, may proceed under Article 66 of the Public General Laws, title "Mortgages", but notices of sale under such power shall be published in two daily newspapers in said city for the period required by law.

731. Where a default of the mortgagors has taken place before the said conveyances have been submitted to the Circuit Court of Baltimore City, it shall, nevertheless, be the duty of said court, upon the submission of the said conveyances to such court, after the said default, to forthwith decree that the mortgaged premises shall be sold on such terms of sale as to the said court shall seem proper, and to appoint by said decree a trustee or trustees to make such sale, requiring bond and security for the performance of the trust, as is usual in the case of the sale of mortgaged premises; and the said trustee or trustees may sell the same agreeably to the terms of the said decree; but before each sale the mortgagee or mortgagees, or some of the mortgagees, or the executor or administrator of a deceased mortgagee, or the assignee or assignees of the mortgagee or one of such assignees, or the executor, or administrator of a deceased assignee, shall file in the court in which the said proceedings are pending, a

statement of the amount of the said mortgage claim remaining due, verifying the same by the oath or affirmation of the party filing the same; and the said affidavit or affirmation may be made before any of the persons mentioned in section 721 of this Article, and the same shall be authenticated as provided for in section 721.

731a. If, upon a sale of the whole mortgaged property by virtue of a decree passed under an assent to the passing of a decree contained in the mortgage under the provisions of section 720 of this Article, the net proceeds of sale, after the cost and expenses allowed by the court are satisfied, shall not suffice to pay the mortgage debt and accrued interest, as the same shall be found and determined by the judgment of the court upon the report of the auditor thereof, the court may, upon the motion of the plaintiff, the mortgagee or his legal or equitable assignee, after due notice, by summons or otherwise, as the court may direct, enter a decree *in personam* against the mortgagor or other party to the suit or proceeding, who is liable for the payment thereof, for the amount of such deficiency; *provided* the mortgagee or his legal or equitable assignee would be entitled to maintain an action at law upon the covenants contained in the mortgage for said residue of said mortgage debt so remaining unpaid and unsatisfied by the proceeds of such sale or sales; which decree shall have the same effect and be a lien as in a case of a judgment at law, and may be enforced in like manner by a writ of execution in the nature of a writ of *fieri facias* by attachment or otherwise.

732. The provisions of sections 722 to 729, inclusive, of this Article, shall apply to all the proceedings under section 731.

ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, SPECIAL SESSION, 1933, CHAPTER 56.

AN ACT to add a new section to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), entitled "Baltimore City", sub-title "Mortgages", said new section to be known as Section 720A and to follow immediately after Section 720 of said Article, relating to securing decrees under mortgages containing an assent to such decrees for a foreclosure sale.

WHEREAS, Under the aforesaid Section 720, as the same has been construed by the Court of Appeals of Maryland, a holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now secure a decree under the assent to such decree contained in such mortgage, and upon any default in such mortgage, the trustee named in said decree may foreclose the same, even though such foreclosure be against the wishes of the holders of the remainder of said debt secured by said mortgage; and

WHEREAS, By reason of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in Baltimore City, and any precipitate foreclosure would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of the investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title "Baltimore City," sub-title "Mortgages," said new section to be known as 720A and to follow immediately after Section 720, and to read as follows:

720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend, and any consent so given shall be as valid and effective for the purpose of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and having been passed upon by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved December 15, 1933.

APPENDIX B

ARTICLE 66, ANNOTATED CODE OF MARYLAND (1924 EDITION), ENTITLED "MORTGAGES," SECTIONS 6 TO 10, INCLUSIVE

6. In all mortgages there may be inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, whether lands or goods and chattels, upon such terms and on such contingencies as may be expressed therein, and where the interests in any mortgage are held under one or more assignments, or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises; and any sale made and set aside upon the ground that said power is indivisible may, by the court that set aside such sale, be reviewed on the petition of the person who made the same, or any other person interested therein, and said court may annul its former decree or order, and thereupon the same procedings shall be had and the said court shall have the same full power as if such sale had not been set aside, and the

said court may confirm such sale or set it aside for any other sufficient reason than that the aforesaid power is indivisible; provided, there has been no change of title or interest in the mortgaged premises since such sale.

7. Before any person so authorized shall make any such sale, he shall give bond to the State in such penalty and with such security as shall be approved by the judge or clerk of a court of equity of the city or county in which the mortgaged premises lie, or in case of goods and chattels, where the same may be, to abide by and fulfill any order or decree which shall be made by any court of equity in relation to the sale of such mortgaged property or the proceeds thereof, and such bonds shall be and remain as an indemnity to and for the security of all persons interested in such mortgaged property or the proceeds thereof and be subject to be sued as other bonds taken in the name of the State and subject to the same limitations and disabilities as such other bonds.

8. In all sales made in pursuance of such authority there shall be given such notice as may be stated in such mortgage, or if there be no agreement as to notice, then the party offering the same for sale shall give twenty days' notice of the time, place and terms thereof by advertisement in some newspaper printed in the county where the mortgaged premises lie, if there be one so published, and, if not, in a newspaper having a large circulation in said county, and also by advertisement set up at the court-house door of said county.

9. All such sales shall be reported under oath to the court having chancery jurisdiction where the sale is made, and there shall be the same proceedings on such

report as if the same were made by a trustee under a decree of said court, and the court shall have full power to hear and determine any objections which may be filed against such sale by any person interested in the property and may confirm or set aside said sale.

10. If such sale be set aside by the court, a re-sale may be ordered to be made by the party who made the previous sale, or the court may, if justice requires it, appoint a trustee to sell the same.

CHAPTER 57 OF THE ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, SPECIAL SESSION, 1933

AN ACT to add a new section to Article 66 of the Code of Public General Laws of Maryland (1924 Edition), title "Mortgages," said new section to be known as Section 6A, and to follow immediately after Section 6 of said Article, suspending for the period of the Emergency hereinafter declared, the right of a holder of a fractional interest in the debt secured by any mortgage to foreclose or procure the foreclosure thereof except as provided in this Act.

WHEREAS, Under said Section 6 of Article 66 of the Code of Public General Laws of Maryland (1924 Edition) the holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now sell or procure the sale of the mortgaged property in accordance with the power of sale contained in such mortgage, after a default has occurred in such mortgage, even though such sale be against the wishes of the holders of the remainder of said debt secured by said mortgage; and,

WHEREAS, By reasons of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in the State of Maryland, and any precipitate foreclosure sales would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That a new section be and the same is hereby added to Article 66 of the Code of Public General Laws of Maryland (1924 Edition), title "Mortgages," said new section to be known as Section 6A to follow immediately after Section 6, and to read as follows:

6A. In all mortgages of real and/or leasehold property heretofore given or hereafter given, wherein there is inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, upon such terms and on such contingencies as may be expressed therein, the power of sale therein contained shall not be exercised during the period of the emergency aforesaid, except by and with the consent of the record holders of not less than 25% of the entire unpaid principal debt secured by the mortgage sought to be foreclosed, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in the entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the

summary and exparte remedies given under said Section 6 of Article 66 as aforesaid. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend and any consent so given shall be as valid and effective for the purpose of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and being passed upon by a yea and nay vote, supported by three-fifths of all the General Assembly, the same shall take effect from the date of its passage. Approved December 15, 1933.

APPENDIX C

SUMMARY FORECLOSURES OF MORTGAGES UNDER A POWER OF SALE CONTAINED IN THE MORTGAGE.

The power of sale contained in the mortgage is in the following language (Record p. 5): "and upon any default in the terms of this mortgage, a sale may be made by the said mortgagee, its successors or assigns, or by its or their attorney, under Article LXVI, Sections 6 to 10 inclusive of the Maryland Code of 1904,

Public General Laws or any other general or local laws of the State of Maryland relating to mortgages."

The remedy authorized by these sections will be found under the same article and section numbers in the Annotated Code of Maryland 1924. These statutes were not intended to confer a new or special jurisdiction on courts of equity. In proceedings under these statutes there is no necessity for any court to appoint a trustee to sell. The mortgagee or his attorney is clothed with such authority by the consent contained in the mortgage and from the filing of the bond, as required by the statute. The power to sell is substituted for a decree. The mortgagor is entitled to no notice of the proceedings to sell and no questions can be raised as to who are to be parties to the proceedings. The statute expressly provides, where the interest in any mortgage are held under one or more assignments or otherwise, the power of sale therein contained shall be divisible, and he or they holding any such interest, who shall first institute proceedings, to execute such power, shall thereby acquire the exclusive right to sell the mortgaged premises.

The proceedings are commenced by filing the mortgage or a certified copy of it and a direction to the clerk of the circuit court in equity in the city or county where the land lies to docket the case. Before making a sale, the person authorized to make it must file a bond. The bond may be filed at any time before the sale. It need not be filed before the advertisement. The nature of the bond is provided by the statute as well as the approval thereof. There must be given a notice or advertisement of the sale. The sale must be in conformity with the advertisement and it must be made in the county or city where the mortgaged premises are situated. The sale being made, a report of

sale must be filed in conformity with the statute. The mortgagee's or the attorney's report of sale is his first official intercourse with the court and its supervisory power then commences and the court cannot revise, confirm, ratify or reject the sale until it has been reported. On such report the jurisdiction of the court becomes complete and equitable principles such as are applicable to sales under decrees in other cases prevail. From this point on the proceedings are carried to a conclusion in the same manner as foreclosure proceedings conducted by bill in equity.

For further treatment of foreclosure under power of sale authorized by the mortgage, see MILLER, EQUITY PROCEDURE (1897) Section 452 et seq. VENABLE, SYLLABUS ON LAW OF ESTATES, pages 219 to 222. Also see Annotations to Sections 6 to 10 inclusive of Article 66, Vol. II, Annotated Code of Maryland (1924), and also supplement to the Annotated Code of Maryland (P.G.L. 1929) under corresponding section numbers.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 441.

UNITED STATES MORTGAGE COMPANY AND MORTGAGE GUARANTEE COMPANY,

PETITIONER,

vs.

MARY E. MATTHEWS AND JOHN MATTHEWS.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

B. Harris Henderson,

FREDERICK H. HENNIGHAUSEN,

J. CALVIN CARNEY,

CHARLES F. STEIN, JR.,

Counsel.

The Daily Record Co. Print, Baltimore.

INDEX.

PAGE.

STATEMENT OF CASE 1

ARGUMENT 4

CASES CITED.

Central Vermont R. Co. vs. White, 238 U. S. 507 4

Consolidated Turnpike Co. vs. Norfolk & Ocean R. R., 228 U. S. 596 7

De Saussure vs. Gaillard, 127 U. S. 216 7

Gilson vs. Mississippi, 162 U. S. 565 5

Hopt vs. Utah, 110 U. S. 574 5

Klinger vs. Missouri, 80 U. S. 257 7

Layne vs. Western Well Works, 261 U. S. 387 5

Loeber vs. Schroeder, 149 U. S. 580 5

People vs. Atwell, 261 U. S. 590 7

Preston vs. Chicago, 226 U. S. 447 7

Rogers vs. Hennepin County, 240 U. S. 184 7

Southern Power Co. vs. North Carolina Pub. Ser. Co., 263 U. S. 508 5

Williams vs. Williams, 7 Gill 232 5

Wood vs. Cheseborough, 228 U. S. 672 7

STATUTES CITED.

Acts of Assembly 1833, Chapter 181 5

Maryland Code Public Local Laws, Article 4, Section 720 5

Maryland Declaration of Rights, Articles 19, 23, 44 8

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vs.

MARY E. MATTHEWS AND JOHN MATTHEWS.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

STATEMENT OF CASE.

The Mortgage Guarantee Company, a body corporate of the State of Delaware, was organized about the year 1906 for the purpose of loaning money to be secured by mortgages, which mortgages were in turn sold by it, the said company guaranteeing the repayment thereof to the purchaser. Up until the year 1917 or 1918 it sold mortgages in their entirety (Record p. 36). Thereafter it sold fractional interests in mortgages, said interests being evidenced by an assignment of an undivided share in the mortgage and the mortgage debt (Record pp. 8, 36, 37). Outside of the State of Maryland this procedure was not followed (Record p. 37). The respondents are the holders of an assignment of an undivided share in a mortgage

and in the mortgage debt secured thereby, and as such were entitled to a decree of foreclosure and a sale under the decree. In order to obtain the decree it is only necessary to file an ex parte petition for a decree and to file the mortgage as an exhibit. The decree is signed irrespective of default in the terms of the mortgage, but the terms of the decree (Record p. 111) as to sale only become effective upon default. The respondents, as assignees, were entitled to such a decree.

Richardson vs. Owings, 86 Md. 663.

At the time the Mortgage Guarantee Company assigned the share in the mortgage to the respondents said mortgage was in default because of non-payment of taxes.

In the early part of 1933 the said Mortgage Guarantee Company became involved in financial difficulties, and on February 14th, 1933, sent to the holders of assignments of interests in mortgages and to holders of certificates an open letter (Record p. 24); the respondents refused to consent to the plan of re-adjustment because thereunder the Mortgage Guarantee Company could extend the time for the repayment of the mortgage held by the respondents, and also because thereunder the respondents would agree to pay to the Mortgage Guarantee Company an additional one per cent of the interest due on said mortgage (Record p. 26).

In the fall of 1933 several holders of assignments in mortgages, who had not assented to the re-adjustment plan, obtained decrees under the assents contained in the mortgages of which an undivided interest had been assigned to such holders, thereupon the said Mortgage Guarantee Company obtained decrees in many cases and had its appointees made trustees in said cases (Record pp. 50, 51, 52), but said trustees did not make any attempt

to sell the properties to satisfy the mortgage debt (Record p. 49), said action being taken to prevent others interested in the mortgages from exercising their rights (Record p. 56). Thereafter at the special session of the Legislature of Maryland, 1933, the counsel for the Mortgage Guarantee Company prepared and had introduced by his law partner, an Act which became Chapter 56 of the Acts of 1933, Special Session of the General Assembly of Maryland (Record pp. 48, 49, 52, 53). This Act provided that in the City of Baltimore no decree should thereafter be passed under the assent to a decree contained in a mortgage during the period of emergency therein declared unless such application be made or concurred in by the record holders of not less than 25% of the unpaid mortgage debt; that the period of emergency was declared as a matter of legislative determination to be for the period from the date when said Act took effect until June 1st, 1935. At the same session of the Legislature a Bill was introduced (Record p. 90) declaring as a matter of legislative determination that a period of emergency existed which would expire June 1st, 1935; that therefore during such period of emergency foreclosure of a mortgage for principal defaults should be suspended, as well as any action on a bond for principal default. This Act, however, was not passed by the Legislature (Record pp. 41, 42).

On December 22, 1933, seven days after Chapter 56 aforesaid became effective, Mary E. Matthews and John Matthews filed a petition for a decree of foreclosure and the appointment of a trustee to make sale (Record p. 2); the United States Mortgage Company, as owner of the equity of redemption, and the Mortgage Guarantee Company, representing other holders of undivided interest in said mortgage, intervened and set up the provisions of

Chapter 56 of the Acts of 1933, Special Session, as a reason why the petition for a decree should not be granted. The Circuit Court No. 2 of Baltimore City held said Act unconstitutional, which action of said Court was affirmed on appeal to the Court of Appeals of Maryland.

ARGUMENT.

POINT A.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED.

(1) The decision of the Court of Appeals of Maryland rested on grounds of local procedure for the foreclosure of mortgages in Baltimore City.

In the case of Central Vermont R. Co. vs. White, 238 U. S. 507, it was held that matters affecting the remedy are governed by the law of the forum, and a decision of a state court on a matter such as the form of the action, sufficiency of the pleadings, rules of evidence is not reviewable by the United States Supreme Court.

The Court of Appeals by its decision, held that Chapter 56, Acts of 1933, Special Session, had no effect on the Matthews mortgage (Record p. 127); that all those mortgagees, holding an undivided interest in a mortgage made prior to December 15, 1933, still had the right to proceed by foreclosure under the assent to a decree, and that the said Act meant that mortgages made after December 15, 1933, could not be foreclosed under an assent to a decree except in the manner prescribed by the Act; in other words: the procedure for foreclosure of mortgages made before the date of the Act should be different than the procedure for foreclosure of mortgages made after the date of the Act.

Chapter 56 of the Acts of 1933, Special Session, proposed to add a new section to Article 4, Section 720, Code of Public Local Laws (Petitioner's Brief p. 23). Article 4, Section 720, refers to the method of foreclosing mortgages in Baltimore City wherein the mortgagor shall declare his assent to the passing of a decree for sale; this procedure for sale of mortgaged properties in Baltimore City was first authorized by Chapter 181 of the Acts of 1833 (Record p. 105). The Court of Appeals, in the case of Williams vs. Williams, 7 Gill, 232, held Chapter 181 of the Acts of 1833 to be "a summary mode of proceeding by which the mortgagee may arrive at a decree by stipulating for it in his mortgage"; thus declaring that this method of enforcing the collection of the mortgage indebtedness was a matter of *local* procedure. It is a well recognized principle of law that a decision of a state Court resting on grounds of state procedure does not present a Federal question:

Gibson vs. Mississippi, 162 U. S. 565
Hopt vs. Utah, 110 U. S. 574
Loeber vs. Schroeder, 149 U. S. 580.

(2) Chapter 56, Acts of 1933, Special Session, is local in nature, being confined to Baltimore City, relates only to a certain designated class of persons in the City of Baltimore, and is not of importance to the public.

In the case of Layne & Co. vs. Western Well Works, 261 U. S. 387 at p. 393, the Court said, "• • • • it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties • • •."

Southern Power Co. vs. North Carolina Pub. Ser. Co., 263 U. S. 508.

The testimony of the witnesses, both for petitioners and respondents, shows that the Mortgage Guarantee Company is the only person or corporation in the State of Maryland that sells fractional interests in mortgages and assigns an undivided share in said mortgage to the purchaser. This testimony is uncontradicted (Record pp. 37, 38; Fairbank; pp. 43, 44, 45, 46, 47, Buck; p. 56, Tucker). The Record further discloses that Chapter 56, Acts of 1933, Special Session, was prepared and introduced at the instigation of the Mortgage Guarantee Company (Record pp. 48, 49, 52, 53), and was designed for the specific relief of said Mortgage Guarantee Company (Opinion of Court—Record pp. 108-109). Said statute is an attempted moratorium, not for debtors, but for a creditor, and for a 75% creditor against a 25% creditor. The Act is not of importance to the public, but only of importance to the Mortgage Guarantee Company. An attempt is made to justify the public importance by the declaration of a state of emergency, but the attempt is fallacious because the argument of the petitioners on this point is: as to mortgages in Baltimore City which have been assigned and in which undivided interests are held by *more than one person,* an economic emergency exists, which runs from December 15, 1933, to June 1st, 1935, according to legislative determination; as to *all other mortgages* there is *no* emergency affecting and threatening the welfare, comfort and safety of the people during the same period of time; the legislature not having passed the bill for a general suspension of foreclosure for the same period (Record p. 90).

POINT B.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS BASED UPON STATE LAW AS WELL AS THE LAW OF THE CONSTITUTION OF THE UNITED STATES.

To give the Supreme Court jurisdiction it must appear affirmatively not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the case, and that the decision could not have been given without deciding it; and when it does not appear on which of two grounds the judgment was based, then if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, the Supreme Court will not assume jurisdiction.

Klinger vs. Missouri, 80 U. S. 257
Rogers vs. Hennepin County, 240 U. S. 184
People vs. Atwell, 261 U. S. 590.

Even though the state court decided the Federal question, still if the Court also decided an action could not be sustained under the State Statute, the Supreme Court will not assume jurisdiction.

De Saussure vs. Gaillard, 127 U. S. 216
Consolidated Turnpike Co. vs. Norfolk & Ocean R. R., 228 U. S. 596
Preston vs. Chicago, 226 U. S. 447
Wood vs. Chese borough, 228 U. S. 672.

The defendants in error contended that the Act of the Special Session of 1933, Chapter 56, was unconstitutional as conflicting with

(a) Article 1, Section 10 of the Constitution of the United States.

(b) Section 1 of the 14th Amendment to the Constitution of the United States.

(c) Articles 19, 23 and 44 of the Maryland Declaration of Rights (Record p. 120).

Articles 19 and 23 of the Declaration of Rights, contain provisions similar to those of the Constitution of the United States (Record p. 16). The Trial Judge held that the Statute violated these sections of the Bill of Rights as well as the Constitution of the United States, because it impaired the obligation of a contract, and because it was confined in its application to a limited class of persons, i. e. holders of a less than 25% interest in mortgages on property in Baltimore City, and that such classification was unreasonable and arbitrary (Record p. 101). The Court of Appeals affirmed the decree of the Circuit Court No. 2, but ruled that such classification was reasonable and not arbitrary.

Article 44 of the Declaration of Rights is as follows:

> "The provisions of the Constitution of the United States and of this State, apply as well in time of war as in time of peace; and any departure therefrom, or violation therefrom, under the plea of necessity, or any other plea, is subversive of good government and tends to anarchy and despotism."

These rights guaranteed to the individual by the Constitution of the United States, therefore are also guaranteed to the citizens of Maryland by the Constitution of Maryland, which expressly prohibits their suspension by emergency legislation, and the prohibition of the passage of laws impairing the obligation of contract is therefore embodied in the Constitution of Maryland.

Chapter 56 of the Acts of 1933, Special Session, is a purely local law. It applies only in the City of Baltimore—it was designed to deprive a certain class of persons (holders of less than 25% interest in mortgages in Baltimore City) of a certain remedy, which was part of their mortgage contract, which remedy was—in the language of the Court of Appeals—"an extremely valuable portion of the contract", the taking away of which rendered such legislation unconstitutional and void (Record p. 124). The constitutionality of such Act was so dubious to the Maryland General Assembly, that it attempted to justify it on the grounds of emergency, as set forth in the lengthy preamble to the Act.

This justification was not sustained, for in the language of the Court of Appeals: "If the law under consideration was unconstitutional in the absence of the emergency, in our opinion it cannot be held to be constitutional because of any fancied or real emergency, but its constitutionality must be tested in the same way as if it had been passed in times of economic prosperity" (Record pp. 125 and 126).

In spite of the express prohibition of Article 44 of the Maryland Declaration of Rights, the Maryland General Assembly by this Act attempted to suspend a contractual right guaranteed "in time of war as well as in time of peace" by the Maryland Declaration of Rights.

The decision of the Court of Appeals was therefore well founded upon principles of state law, and the Supreme Court should therefore not assume jurisdiction over this case.

Consolidated Turnpike Co. vs. Norfolk Ocean R. R., 228 U. S. 596.

The Court of Appeals in discussing the question of impairment of contract by Chapter 56, Acts of 1933, Special Session, concludes that subject as follows: "If, then, all of such remedies are taken away and there remains a totally inadequate remedy, as compared to those taken away, it seems clear that an attempt to make such legislation applicable to pre-existing mortgages is unconstitutional and void" (Record p. 124).

It is submitted that the use of this language also justifies the Supreme Court to determine that the decision of the Court of Appeals was based on the conflict of Chapter 56, Acts of 1933, Special Session, with the constitutional prohibitions contained in the Maryland Declaration of Rights, and that therefore the Supreme Court should not assume jurisdiction.

Respectfully submitted,

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Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 441.

UNITED STATES MORTGAGE COMPANY AND MORTGAGE GUARANTEE COMPANY

vs.

MARY E. MATTHEWS AND JOHN MATTHEWS.

BRIEF ON BEHALF OF RESPONDENTS.

FREDERICK H. HENNIGHAUSEN,
J. CALVIN CARNEY,
CHARLES F. STEIN, JR.,
Counsel for Respondents.

The Daily Record Co. Print, Baltimore.

CITATIONS.

Cases.

	PAGE
Barnitz vs. Beverly, 163 U. S. 118	4
Baugher vs. Nelson, 9 Gill 299	6
Block vs. Hirsch, 256 U. S. 135	8, 18-19
Borgnis vs. Falk, 147 Wis. 327	10
Bradley vs. Lightcap, 195 U. S. 1	4
Bronson vs. Kinzie, 1 How. 311	4, 7
Bryan vs. Virginia, 135 U. S. 693	8
Charles vs. Claggett, 3 Md. 82	6
Charles Wolff Packing Co. vs. Court, 262 U. S. 522	19
Chastleton Corporation vs. Sinclair, 264 U. S. 543	18
Christman vs. Miller, 107 U. S. 313	17
Conway vs. Union Sewer Pipe Co., 184 U. S 540	12
Cotting vs. Kansas City, 183 U. S. 79	10-11
Doeller vs. Mortgage Guarantee Company, No. 39 January Term, 1934	3, 5
Gulf Col. & Santa Fe R. R. Co. vs. Ellis, 165 U. S. 150	12
Gunn vs. Barry, 82 U. S. 619	13
Hendrickson vs. Apperson, 245 U. S. 105	17
Home Building & Loan Assn. vs. Blaisdell, 290 U. S. 398	9, 20
Howard vs. Bugbee, 24 How. 461	4
Knights of Pythias vs. Meyer, 265 U. S. 30	15
Levy Leasing Company, Inc. vs. Siegel, 258 U. S. 242	9
Liggett Co. vs. Lee, 288 U. S. 517	12
Loan Assn. vs. Topeka, 87 U. S. 65	13
Marcus Brown Holding Company vs. Feldman, 256 U. S. 170	9
McCracken vs. Hayward, 2 How. 608	4

PAGE

Miners Bank vs. Snyder, 100 Md. 57 6
Missouri & Pacific R. R. vs. Nebraska, 164 U. S. 403 .. 13
New Orleans vs. Louisiana, 102 U. S. 203 8
Oatman vs. Bond, 15 Wis. 29 7
Richardson vs. Owings, 84 Md. 663 ..... 3, 5
Seibert vs. Lewis, 122 U. S. 194 6
Shoemaker vs. U. S., 147 U. S. 282 18
Spann vs. Gaither, 152 Md. 1 12
Supervisor vs. U. S., 18 Wall. 71 15
Tioga R. R. vs. Blossberg, 20 Wall. 137 15
University of Maryland vs. Williams, 9 Gill & Johnson, 365 11
Walker vs. Whitehead, 16 Wall. 314 4
Watson vs. State of Maryland, 218 U. S. 173 15
Worthen vs. Thomas, 292 U. S. 426 ..... 9, 14

STATUTES.

Article 44, Maryland Declaration of Rights 20
Chapter 123, Section 720, Acts of 1898 22
Chapter 56, Acts of 1933, Special Session 22

TEXTS.

Miller Equity Procedure, Section 445 5
Venable Syllabus on Real Estate, Section 177 5

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vs.

MARY E. MATTHEWS AND JOHN MATTHEWS.

BRIEF ON BEHALF OF RESPONDENTS.

STATEMENT OF FACTS.

On July 30th, 1925, Walter H. Worner executed a first mortgage to the Mortgage Guarantee Company for Three Thousand Dollars ($3,000) on the two-story brick row dwelling No. 1339 Patapsco Avenue, Baltimore, Maryland. The mortgage provided for the payment of interest at six per cent. per annum, payable quarterly, and for the maturity of the principal three years from date, and contained the usual covenants to pay all taxes, assessments, public dues and charges levied or assessed against the mortgaged property, as well as the provision:

"And the said Mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court

of Baltimore City or the Circuit Court No. 2 of Baltimore City, for a sale of the property hereby mortgaged, in accordance with Chapter 123, Sections 720 to 732, inclusive, of the Laws of Maryland passed at the January Session in the year 1898, or any amendments or additions thereto" (Record, p. 3).

On July 30, 1932, the Mortgage Guarantee Company sold and assigned to Mary E. Matthews and John Matthews, an undivided 500/2950 share (equivalent to $500) in said mortgage—$50.00 having been paid on account of the principal thereof. The assignment recites the maturity of said mortgage had been extended as follows:

$100.00 due July 30, 1933

$100.00 due July 30, 1934

$2,750.00 due July 30, 1935.

This assignment of mortgage was duly recorded (Record, p. 8).

On December 15, 1933, the General Assembly of Maryland passed Chapter 56, Acts of 1933 (Special Session), which attempted to withdraw from holders of less than 25% of the unpaid mortgage debt the right to avail themselves of Sections 720-732 of the Acts of 1898 while preserving all rights thereunder to holders of 25% or more of the entire unpaid mortgage debt. At the same Session of said General Assembly there was submitted thereto an Act designated to afford moratorium relief to mortgagors, which Act was not passed (Record, p. 90).

Sections 720-732, Acts of 1898, and Chapter 56, Acts of 1933 (Special Session), above referred to, will be found in an appendix to this brief.

As of December 22, 1933, Mary E. Matthews and John Matthews, record holders by assignment of said undivided 500/2950 share in said mortgage, filed a petition for a Decree for the sale of said property because of default in payment of the 1932 and 1933 taxes and installment on the principal of the mortgage debt, and asserted said Chapter 56 was unconstitutional for the reasons therein set forth. The applicants, as assignees, were entitled to such a Decree under authority of:

Richardson vs. Owings, 86 Md. 663,
Doeller vs. Mortgage Guarantee Co., No. 39 of January Term, 1934, Court of Appeals of Maryland,

in the absence of Chapter 56, Acts of 1933 (Special Session).

The United States Mortgage Company, owner of the equity of redemption in said property, and Mortgage Guarantee Company, holder of record or duly authorized representative of approximately 83% of the unpaid mortgage debt, filed a Demurrer to said Amended Petition which was overruled, and thereupon filed an Answer. The case was heard by Eugene O'Dunne, J., upon Amended Petition and Answer; he held Chapter 56, Acts of 1933 (Special Session) unconstitutional and signed a Decree appointing Clarence A. Tucker, Solicitor for United States Mortgage Company and Mortgage Guarantee Company, Trustee to make sale. The United States Mortgage Company and Mortgage Guarantee Company took an appeal from this decision to the Court of Appeals of Maryland, which upheld the decision of the lower Court.

ARGUMENT.

I.

CHAPTER 56, ACTS OF 1933 (SPECIAL SESSION) IS UNCONSTITUTIONAL BECAUSE SAID ACT IMPAIRS THE OBLIGATION OF A CONTRACT, I. E., THE MORTGAGE MADE BY WALTER H. WORNER TO MORTGAGE GUARANTEE COMPANY, AND IN TURN ASSIGNED BY IT TO RESPONDENTS, MARY E. MATTHEWS AND JOHN MATTHEWS, WITHOUT AFFORDING AN ALTERNATIVE REMEDY SUBSTANTIALLY EQUIVALENT TO THAT IN FORCE WHEN THE CONTRACT WAS MADE; SAID ACT ALSO DEPRIVES RESPONDENTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 10, Article 1 of the Constitution of the United States was meant to prohibit State action impairing the obligation of contracts primarily and especially in respect to such legislation passed for the purpose of giving relief to debtors in time of emergency. The Supreme Court of the United States by its decisions has so construed said clause of the Constitution. In the case of Bronson vs. Kinzie, 1 How. 311, this Court held unconstitutional (1) an Illinois Statute granting a moratorium for the period of redemption after sale, and (2) a similar statute preventing a sale unless a bid for two-thirds of the appraised value of the property be received. Howard vs. Bugbee, 24 How. 461, held unconstitutional a similar statute of the State of Alabama.

In Barnitz vs. Beverly, 163 U. S. 118, the Supreme Court held unconstitutional a law of the State of Kansas extending the period of redemption after sale for a period of eighteen months. Among other cases on said clause of the Constitution are:

McCracken vs. Hayward, 2 How. 608;
Walker vs. Whitehead, 16 Wall. 314;
Bradley vs. Lightcap, 195 U. S. 1.

The mortgage contract in this case, when executed, was consummated with reference to the rights and privileges of mortgagor and mortgagee as they then existed. Under the terms and conditions of said mortgage any holder of an interest in said mortgage had the right to secure a decree for the sale of the property mortgaged in accordance with Sections 720 to 732 of Chapter 123 of Laws of Maryland, January Session, 1898 (Richardson vs. Owings, 86 Md. 663; Doeller vs. Mortgage Guarantee Co., No. 39, January Term, 1934, Court of Appeals); there was no condition limiting the right to a decree to the holder of a 25% or more interest in said mortgage. Now by the Act in question it is attempted to so deprive a holder of less than the minimum interest from exercising the right given him by the mortgage. The mortgage intended to give, and contains a covenant which gives this right to any or all the holders of an interest in the mortgage, it is a right given by contract, while the Act of the Legislature gives to the holders of only more than 25% of the interest in the mortgage the right to which all holders of interest in the mortgage were entitled by virtue of the terms thereof.

The Petitioners urge that the legislation in question does not impair the obligation of the contract made by the mortgagor and mortgagee, but that the said Act affects the remedy only, and that the holder of less than a 25% interest in a mortgage still has the remedy afforded him by (a) strict foreclosure, and (b) foreclosure by formal proceedings.

Strict foreclosure in Maryland is an involved and cumbersome method, requiring personal service on the mortgagor, his assigns, and other lien creditors; (Venable, Syllabus on Real Estate, Section 177; Miller Equity Pro-

cedure, Section 445, etc.) there also seems to be some doubt as to the present validity of this proceeding in Maryland. (Charles vs. Claggett, 3 Md. 82, page 96 (Record, p. 104.)) Foreclosure by formal proceedings necessitates the filing of a bill in equity to foreclose the mortgage, said bill to be in conformity with the regular pleadings and practice in equity, requiring service of summons upon parties, answers, testimony, etc. There is doubt whether the holder of an *interest* in a mortgage can file a bill by formal proceedings to foreclose (Record, p. 122). So by relegating the holder of less than a 25% interest in a mortgage to the two remedies above set forth for the enforcement of his rights, Chapter 56 of the Acts of 1933 (Special Session) in effect practically deprives him of any means of enforcing the same.

In the case of Seibert vs. Lewis, 122 U. S. 294, the Supreme Court said:

> "It is well settled by the decisions of this Court that the remedy subsisting in a State when and where the contract is made, and is to be performed, is part of its obligation, and any subsequent law of the State which so effects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void."

> "The doctrine is most strongly stated in Bryan vs. Virginia, 135 U. S. 693, as follows: 'It is well settled by the adjudications of this Court that the obligation of a contract is impaired in the sense of the Constitution by an Act which prevents its enforcement or which materially abridges the remedy for enforcing it which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious'."

Miners Bank vs. Snyder, 100 Md. 57;
Baugher vs. Nelson, 9 Gill 299.

In the case of Barnitz vs. Beverly (supra), it was held that a state statute seeking to substitute, on the foreclosure of pre-existing mortgages, a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months, in place of the right to sell them free from redemption, is an impairment of the obligation of a contract.

Chapter 56 of the Acts of 1933 (Special Session) is an attempt to deprive respondents of their legal rights; the remedies remaining come in the classification made by the Court in Oatman vs. Bond, 15 Wisconsin 29, where it said "equally objectionable is a law which burdens the remedy with such restrictions as to make it useless or not worth pursuing."

In Bronson vs. Kinzie, 1 How. 311, it was said:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

Chapters 56 and 57, Acts of 1933 (Special Session), are not merely a modification of the remedy; they affect a material and injurious change in the obligation. The legal right to a decree appointing a trustee and to have the trustee offer said property for sale upon default belonged to the mortgagee when the mortgage was made, as did the right in a power of sale contained in a mortgage.

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and posses-

sion does not modify the remedy merely, it destroys for the period of delay all remedy as far as the enforcement of that right is concerned.

The remedies denied to the respondents are so interwoven with and part of the rights given to the mortgagee by the terms of the mortgage that the denial of the remedy is a denial of the right; and so has the same effect as if the Acts directly impaired the obligation of the contract itself.

Bryan vs. Virginia, supra;
New Orleans vs. Louisiana, 102 U. S. 203, 207.

The right of the mortgagee to realize on the security, in event of default, is suspended for one and one-half years by said Chapters 56 and 57, Acts of 1933 (Special Session). This period is fixed and absolute, without relation to the continuance of or change in existing conditions, and without judicial determination of adequate cause, or power of change to adjust to altered conditions.

It is obvious that the changes are material and prejudicial to the mortgagee, and not only his remedies but also his substantial rights are materially impaired; in the language of the Court of Appeals of Maryland (Record, p. 124):

> "If then all of such remedies are taken away, and there remains a totally inadequate remedy, as compared to those taken away, it seems clear that an attempt to make such legislation applicable to pre-existing mortgages is unconstitutional and void."

It is argued that support for the statute now under consideration may be found in the well-known "Rent Cases" in the Supreme Court: Block vs. Hirsch, 256 U. S. 135;

Marcus Brown Holding Co. vs. Feldman, 256 U. S. 170; Levy Leasing Co., Inc., vs. Siegel, 258 U. S. 242; and in the more recent Minnesota Mortgage Moratorium case (Home B. & L. Assn. vs. Blaisdell, 290 U. S. 398). These cases do decide that in a legislatively declared emergency directly affecting the public interest (not a private interest), laws of temporary duration, proportioned to the emergency, and terminating with said emergency, may validly create a reasonable moratorium against the enforcement of their legally valid claims by landlords and mortgagees, on condition of payment to them of the reasonable rental value of the property during the period of the moratorium.

The Rent Cases, said Mr. Justice Holmes (who wrote the opinion in the first two) in the later case of Pennsylvania vs. Mahon, 260 U. S. 393, 416, "went to the verge of the law".

The Acts here in question are not consistent with the principles laid down in the Blaisdell case. In the Minnesota mortgage law the time for which such moratorium was to take effect was not arbitrarily fixed but was to be determined by the Court, and could be terminated sooner than the time fixed in the law if the Court should find that conditions warranted it.

In the later case of Worthen vs. Thomas, 292 U. S. 426, holding unconstitutional the Arkansas exemption statute, the Supreme Court pointed out that the decision in the Blasidell case was not to be construed to "permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them".

In the Acts of the Legislature here in question there is no provision for a payment to the mortgagees of a reasonable rental value of the property during the period of the moratorium, neither is any Court authorized to terminate the effect of such Acts if the Court should find that conditions warrant a termination in a particular case.

II.

SAID ACT IS UNCONSTITUTIONAL BECAUSE IT DENIES THE EQUAL PROTECTION OF THE LAW TO HOLDERS OF LESS THAN 25% INTERESTS IN A MORTGAGE.

The Act of the Legislature makes a classification between the holders of less than 25% of the entire interests in a mortgage and the holders of more than 25% of the interests in the same mortgage, and is repugnant to the 14th Amendment of the Constitution of the United States.

The rule governing classification is briefly as follows: (a) It must be based on substantial distinctions which make real differences. (b) It must be germane to the purposes of the law. (c) It must not be limited to existing conditions only and must apply equally to each member of the class.

Borgnis vs. Falk, 147 Wis. 327.

It is submitted that the Act of the Legislature does not meet any of the requirements laid down. Is there any substantial distinction between a person owning a 24% interest and one owning a 25% interest in a mortgage, and is there any real difference caused by the possession of the 1%?

In the case of Cotting vs. Kansas City, 183 U. S. 79, the Supreme Court said:

> "It appears that a classification is attempted between stock-yards doing a large and those doing a small business. The express and only classification is in the amount of business done by the two classes. * * * it has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the Fourteenth Amendment, which prohibits any state to deny to any individual the equal protection of the laws. * * * We must always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. * * * This statute is not simply legislation which in its indirect results affects different individuals differently, * * * but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

And in University of Maryland vs. Williams, 9 Gill and Johnson 365, Buchanan, C. J., in discussing the corresponding section of the Maryland Bill of Rights (Article 23), said:

> "An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law."

The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground,—something which bears a just and proper relation to the at-

tempted classification, and is not a mere arbitrary selection.

Gulf, Colorado & Santa Fe R. R. Co. vs. Ellis, 165 U. S. 150;
Liggett Co. vs. Lee, 288 U. S. 517;
Spann vs. Gaither, 152 Md. 1.

In the case of Conway vs. Union Sewer Pipe Company, 184 U. S., p. 540, the Court said, in speaking of unequal protection of the law and classification:

> "But upon this general question we have said that the guarantee of the equal protection of the law means that no person or class of persons shall be denied the same protection of the law, which is enjoyed by every person, or every person in the same class and like circumstances."

III.

CHAPTER 56, ACTS OF 1933, SPECIAL SESSION, IS UNCONSTITUTIONAL BECAUSE SAID ACT IS IN THE CLASSIFICATION OF ONE PASSED FOR A PRIVATE USE AND NOT FOR A PUBLIC USE.

The testimony of the witnesses, both for petitioners and respondents, shows that the Mortgage Guarantee Company is the only person or corporation in the State of Maryland that sells fractional interests in mortgages and assigns an undivided share in said mortgage to the purchaser. This testimony is uncontradicted (Record, pp. 37, 38, Fairbank; pp. 43, 44, 45, 46, 47, Buck; p. 56, Tucker). The Record further discloses that Chapter 56, Acts of 1933, Special Session, was prepared and introduced at the instigation of the Mortgage Guarantee Company (Record, pp. 48, 49, 52, 53), and was designed for the specific relief of said Mortgage Guarantee Company (Opinion of Court, Record, pp. 108-109). Said statute is an attempted moratorium, not for debtors, but for a creditor, and for a 75% creditor against a 25% creditor.

The Act is not of importance to the public, but only of importance to the Mortgage Guarantee Company, a mortgagee, not a mortgagor.

The testimony shows that the Mortgage Guarantee Company, its subsidiaries and affiliated companies, owns or has control of the equity of redemption in *over sixty per cent.* of the properties conveyed as security for mortgages made to said Mortgage Guarantee Company, and in which mortgages on property in the State of Maryland fractional interests were assigned by said Mortgage Guarantee Company (Record, pp. 82-85, Exhibit No. 3, Record, p. 94). By the passage of Chapters 56 and 57, Acts of 1933, Special Session, the said Mortgage Guarantee Company, by virtue of its control of over seventy-five per cent. of the outstanding assignments of mortgages, could effectively block any foreclosure of mortgages of which it had assigned undivided shares or interests, and so could protect itself from any liability as guarantors of said mortgages. The substantial effect is to transfer the property of the respondents (the right to foreclose the mortgage by summary proceedings) to the Mortgage Guarantee Company, by requiring the said respondents to secure the consent of said company in order to foreclose said mortgage. It is quite like taking private property for private use. Such legislation is not consistent with due process of law. "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendments of the Constitution of the United States."

Missouri Pacific Ry. vs. Nebraska, 164 U. S. 403, 417;

Gunn vs. Barry, 82 U. S. 619;

Loan Association vs. Topeka, 87 U. S. 655-664.

Contracts, like other property, must yield somewhat to paramount public interest, but the extent of the permissible interference must be judicially determined by public, not private, or even class interests, and must be only such as is reasonable and appropriate thereto.

* * * * *

The Petitioners contend that Chapter 56 of the Acts of 1933 (Special Session), does not impair the obligation of contract, because the assent contained in a mortgage expressly or by necessary implication contemplates amendments or additions to the original act.

In discussing the assent to a decree contained in the Worner mortgage, the Court of Appeals said (Record, p. 120):

> "The appellants * * * contend that by the language of the mortgage, the mortgagor assented to the sale of the property under and in accordance with the provisions of Sections 720 to 732 inclusive, of Chapter 123 of the Acts of 1898, * * * or any amendments or additions thereto; which meant that the mortgagor consented to having the proceedings for a consent decree governed by any future amendments or additions to those sections which should become effective before the application for the consent decree."
>
> "While it is true that at the time this language was incorporated in the mortgage, there had been no explicit amendment or addition to these sections of the law providing for consent decrees, the argument is made that the language was intended to apply to any future amendments or additions. We are unwilling to give sanction to such a construction; and we hold that the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage. A contrary holding would mean that a

complete destruction of that remedy was contemplated."

Continuing, the Court says (Record, p. 127):

"For the reasons above set forth, we hold that Chapters 56 and 57 of the Acts of the Special Session of the General Assembly of 1933 have no effect upon the mortgage here in controversy."

The meaning attributed by the highest Court of a state to a statute of the State must be accepted by the United States Supreme Court on review as though it had been specifically expressed in the statute.

Watson vs. State of Maryland, 218 U. S. 173;
Knights of Pythias vs. Meyer, 265 U. S. 30.

And the Supreme Court will follow the state construction even though it may not agree with said construction.

Supervisors vs. U. S., 18 Wall. 71;
Tioga R. R. vs. Blossburg, 20 Wall. 137.

The Court of Appeals of Maryland has decided that the meaning of Chapters 56 and 57, Acts of 1933, Special Session, is that mortgages made after December 15, 1933 could not be foreclosed under an assent to a decree or a power of sale contained in the mortgage except in the manner prescribed by the Act; that said Acts did not apply to a mortgage made before December 15, 1933, as was the mortgage in question. Accordingly it is submitted that the meaning attributed to said statutes by the Court of Appeals should be accepted by the United States Supreme Court.

The next point in the Specification of Errors is that said Chapter 56 operates only upon the remedy and does

not impair the substantive rights under the mortgage contract.

The Court of Appeals in its opinion in discussing this question (Record, p. 122) says:

> "The form of the remedy does not enter into his right, which inheres merely in the effectiveness of his remedy, but he is entitled to some remedy, and that remedy must be substantially equivalent in coercive force to that provided by law when the obligation was contracted. * * *
>
> Applying this settled law to the facts of the case now before us, let us ascertain if those facts show a change, modification or abolition of the remedies available to the mortgagees at the time the mortgage was executed, such as would leave them with no remedy at all, or with a remedy which is not substantially equivalent in coercive force to that provided by the law when the obligation was contracted."

The Court then discusses the five distinct methods of procedure, to enable a mortgagee to enforce the right of payment against the property mortgaged, and the effect of Chapter 56 on the mortgage of the respondents in these words:

> "In other words, before the enactment of said Chapter 56, under the express terms of the contract contained in the mortgage, the appellees (respondents) could resort to either one of two summary proceedings for the sale of the mortgaged property, * * * and had the absolute rights to such remedies without the co-operation or consent of any of the other fractional holders of the mortgage; whereas after the passage of said Chapter 56 all summary remedies by sale of the property were denied, unless and until at least 25% in interest of the unpaid mortgage debt should join in the foreclosure proceeding.

> * * * The two remedies denied to the appellees (respondents) are so interwoven with the right contracted for that the abolition of the remedy impairs the right, and is repugnant to the constitutional provisions prohibiting the states from passing legislation impairing the obligation of a contract. * * * It requires no argument to convince us that the right to proceed to the collection of the money due * * * without the consent or co-operation of any other person interested in the mortgage, was an extremely valuable portion of the contract. * * * If, then, all of such remedies should be taken away, and there remains a totally inadequate remedy, as compared to those taken away, it seems clear that an attempt to make such legislation applicable to pre-existing mortgages is unconstitutional and void."

The Court of Appeals of Maryland found that the remedies remaining to respondents are "totally inadequate". The rule is settled that the decision of a State Court upon a question of fact is ordinarily accepted by the Supreme Court. Christman vs. Miller, 107 U. S. 313. And in the present case, it is submitted that the findings of the Circuit Court No. 2 (Record, p. 108) and the Court of Appeals of Maryland, as to the relative value of the different methods of foreclosure, should be accepted by this Court as decisive because of the more intimate knowledge obtained by the lower Courts as to the practical effects of the different remedies, acquired by their constant association with such procedure.

The Petitioners next make the point that even if the contractual rights of the respondents are impaired by the Act, that an economic condition, constituting an emergency, exists and continues, and said legislation is a legitimate exercise of the police power of the state. In the case of Hendrickson vs. Apperson, 245 U. S. 105, it was

held that in order to justify the interposition of the police power of the state, it must appear that the interest of the public, as distinguished from a particular class, requires such intervention, for it is a rule that police power cannot be invoked to protect one class of citizens against another class unless such intervention is for the real protection of society in general. And in the case of Home Building and Loan Association vs. Blaisdell, supra, the Supreme Court held that in times of emergency, affecting the general public, the obligation of the contract might be postponed by the legitimate exercise of the police power of the state. The present case, however, cannot be adapted to the law laid down in the aforesaid cases, for the reason that the economic emergency alleged to exist, is determined by legislative fiat to exist only as to mortgages in Baltimore City which are held by more than one person, and for an arbitrary duration of time running from December 15th, 1933, to June 1st, 1935; the Legislature of the State of Maryland at the same extra session at which Chapter 56 was passed refused to pass a bill for the general suspension of foreclosure of mortgages for the same period (Record, p. 90). The mere fiat of the Legislature, as set out in Chapter 56, is not conclusive on the Court when the facts show contrary conditions to exist.

Shoemaker vs. U. S., 147 U. S. 282.

The case of Chastleton Corporation vs. Sinclair, 264 U. S. 543, involves the Act known as the District of Columbia Rent Act, regulating the rents in the District of Columbia, and which was upheld as an emergency measure in Block vs. Hirsch, 256 U. S. 135. In the Chastleton Case, the Court said:

> "To repeat what was said in Block vs. Hirsch as to the respect due to a declaration of this kind by the

> Legislature, so far as it relates to present facts. But even as to them a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. Charles Wolff Packing Co. vs. Court, 262 U. S. 522. And still more obviously so far as this declaration looks to the future it can be no more than prophecy, and is liable to be controlled by events. A law depending upon the existence of an emergency, or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change * * *."

The respondents submit that this Court is not at liberty to shut its eyes to an obvious mistake, the mistake being that if there is an economic emergency affecting public interest, that said emergency would effect real estate of all kinds and would not be restricted to real estate conveyed as security for a mortgage held by more than one person; and that as the Legislature of the State of Maryland, by its action in refusing to pass the General Moratorium Act, had decided in effect that there is no economic emergency affecting the public in the City of Baltimore, there can be no public emergency justifying the passage of Chapter 56 under the guise of the exercise of police power of the State, particularly as said Act is designed only for the particular use and benefit of the Mortgage Guarantee Company and not for the benefit of the public as a whole. In an act designed to alleviate conditions of public emergency, the means established by the Act must bear a definite relationship to the end sought to be obtained, and certainly the restraint of foreclosure of mortgages by holders of less than 25% interest therein cannot be held to alleviate "abnormal deflation of real and leasehold property values in Baltimore City."

Under the doctrines expressed in the case of Home Building & Loan Association vs. Blaisdell, supra, and other cases heretofore cited, it has been decided that the constitutional prohibitions imposed upon the States by the contract clause of the Federal Constitution are not to be applied with literal exactness, but must be construed in relation and subject to the reserved powers of the several States to safeguard the interests of the people. But by Article 44 of the Maryland Declaration of Rights, the people of the State of Maryland imposed a restriction on the reserved power of the State, by declaring therein that the provisions of the Federal Constitution should strictly apply at all times. In the words of said Article:

> "That the provisions of the Constitution of the United States and of this State, apply as well in time of war as in time of peace; and any departure therefrom, or violation thereof, under a plea of necessity, or any other plea, is subversive of good government and tends to anarchism and despotism."

This Article of the Maryland Declaration of Rights was enacted in the year 1867, and its purpose was undoubtedly to prohibit any modification of constitutional rights and guaranties given to the citizens of the State, under the plea of necessity and distress, the Constitutional Convention having in mind the experiences of its citizens during the period of the Civil War.

Accordingly it is urged that the provisions of the Federal Constitution must be more literally construed in case involving a Maryland Statute, than in cases from other jurisdictions, since the people of Maryland have so expressed themselves in said Article of their Declaration of Rights.

For all of which reasons it is respectfully submitted that the decision of the Court of Appeals of Maryland should be affirmed.

FREDERICK H. HENNIGHAUSEN,

J. CALVIN CARNEY,

CHARLES F. STEIN, JR.,

Counsel for Respondents.

APPENDIX.

Acts of the General Assembly of Maryland of 1898, Chapter 123, Section 720.

Article 4 of the Code of Public Local Laws of Maryland (1930 edition), entitled "Baltimore City", subtitle "Mortgages", Section 720.

720. In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in the said city, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted, may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises.

Acts of the General Assembly of Maryland, Special Session, 1933, Chapter 56.

AN ACT to add a new section to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), en-

titled "Baltimore City", sub-title "Mortgages", said new section to be known as Section 720A and to follow immediately after Section 720 of said Article, relating to securing decrees under mortgages containing an assent to such decrees for a foreclosure sale.

WHEREAS, Under the aforesaid Section 720, as the same has been construed by the Court of Appeals of Maryland, a holder of a fractional interest, no matter how small, in a debt secured by a mortgage, may now secure a decree under the assent to such decree contained in said mortgage, and upon any default in such mortgage, the trustee named in said decree may foreclose the same, even though such foreclosure be against the wishes of the holders of the remainder of said debt secured by said mortgage; and

WHEREAS, By reason of the prolonged business depression, there has been an abnormal deflation of real and leasehold property values in Baltimore City, and any precipitate foreclosure would affect seriously the investment in such mortgage, perhaps injuring irrevocably the safety of the investment; and

WHEREAS, By reason of the aforegoing and other adverse conditions, an emergency is hereby declared to exist as a matter of Legislative determination, necessitating Legislative intervention by the enactment of the provisions hereinafter prescribed, and their application during such emergency; now therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title "Baltimore City," subtitle "Mortgages," said new section to be known as 720A and to follow immediately after Section 720, and to read as follows:

720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720. Where any holder of a fractional interest in an entire mortgage debt is an infant or otherwise incompetent, such consent may be given by his guardian or committee as the case may be, or if there is no such guardian or committee, then such consent may be given by his next friend, and any consent so given shall be as valid and effective for the purposes of this Act as if such holder were not under any disability.

SEC. 2. *And be it further enacted,* That the period of the emergency hereinbefore declared as a matter of Legislative determination, shall be the period of time from the date this Act takes effect to the first day of June, 1935.

SEC. 3. *And be it further enacted,* That this Act is hereby declared to be an emergency law and necessary for the immediate preservation of the public health and safety, and having been passed upon by a yea and nay vote, supported by three-fifths of all the members elected to each of the two Houses of the General Assembly, the same shall take effect from the date of its passage.

Approved December 15, 1933.

SUPREME COURT OF THE UNITED STATES.

No. 441.—October Term, 1934.

United States Mortgage Company and The Mortgage Guarantee Company, Petitioners, *vs.* Mary E. Matthews and John Matthews. } On Writ of Certiorari to the Maryland Court of Appeals.

[December 3, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court

July 30, 1925, one Warner gave petitioner, Mortgage Guarantee Company, a mortgage upon certain real estate in Baltimore, Maryland, to secure $3,000 loaned to him by that company. The mortgage instrument contained ordinary covenants concerning interest, insurance, taxes, &c. Also the following provision:

> "And the said mortgagor doth hereby declare his assent to the passing of a decree by the Circuit Court of Baltimore City or the Circuit Court No. 2 of Baltimore City for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chapter 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto".

In July, 1932, the mortgagee assigned to respondents, Mary and John Matthews, an undivided 500/2950 interest in the unpaid portion of the debt—$2,950.

When the mortgage was executed Section 720, Chapter 123, Maryland laws 1898, was in force. It provided:

"In all cases of conveyances of lands or hereditaments or of chattels real, or goods and chattels personal, situate in said city, wherein the mortgagor shall declare his assent to the passing of a decree for the sale of the same, it shall be lawful for the mortgagee or his assigns at any time after filing the same to be recorded, to submit to either of the Circuit Courts of Baltimore City the said conveyances or copies thereof, under seal of the Superior Court; and the Circuit Court to which the same is so submitted,

may thereupon forthwith decree that the mortgaged premises shall be sold at any one of the periods limited in said conveyances for the forfeiture of said mortgages or limited for a default of the mortgagors, and on such terms of sale as to the said court may seem proper, and shall appoint by said decree a trustee or trustees for making such sale, and shall require bond and security for the performance of the trust as is usual in cases of sales of mortgaged premises". Art. 4, Code Public Local Laws of Maryland (1930 edition), Entitled "Baltimore City," sub-title "Mortgages", Section 720.

The Maryland Court of Appeals in *Richardson* v. *Owings*, (1898) 86 Md. 663, construed the provisions of Sec. 720 and ruled that one who owned part of a mortgage upon property in Baltimore, by proceeding under provisions of that section might obtain the decree there provided for.

There was no amendment or addition to Sec. 720, until the passage of Ch. 56, Act 1933, approved December 15, 1933. That chapter provides:

> "Section 1. Be it enacted by the General Assembly of Maryland, That a new section be and the same is hereby added to Article 4 of the Code of Public Local Laws of Maryland (1930 Edition), title 'Baltimore City,' sub-title 'Mortgages,' said new section to be known as 720A and to follow immediately after Section 720, and to read as follows:
>
> "720A. In all cases submitted to either of the Circuit Courts of Baltimore City for the passage of a decree as provided for in Section 720 aforesaid, no such decree shall hereafter be passed during the period of emergency hereinafter declared, unless such application is made or concurred in by the record holders of not less than 25% of the entire unpaid mortgage debt, it being hereby declared to be the intent of this Section during the period this Section is effective, that the holder or holders of a fractional interest in an entire mortgage debt of less than 25% of the entire interest, shall not have recourse to the summary and exparte remedies given under Section 720".

December 22, 1933, respondents—the Matthews—presented a petition to Circuit Court No. 2, Baltimore City, wherein they alleged execution of the mortgage by Warner, his assent to the passing of

a decree for sale, the assignment of part of the mortgage debt to them, also default. They asked a decree directing sale as permitted by Sec. 720.

Thereupon the United States Mortgage Company, owner of the equity of redemption, and the Mortgage Guarantee Company, holder or duly authorized representative of approximately 83% of the unpaid mortgage debt, intervened. Answering they relied upon Ch. 56, Acts of 1933, and opposed the prayed for decree. The Matthews then filed an amended petition challenging the validity of Chapter 56, because of conflict with Sec. 10, Art. 1, Federal Constitution, and the 14th Amendment; also because it violated the State Constitution.

The trial judge held the chapter unconstitutional "both as impairing the obligation of contract, and as class legislation of an arbitrary and illegal character". Final decree ordered the sale of the mortgaged property and designated a trustee to make it.

Upon appeal the Court of Appeals held:—

That the clause in the mortgage by which the mortgagor gave assent to decree for sale of the property as provided by Sec. 720-732 "or any amendments or additions thereto" when properly construed did not amount to an agreement that the proceeding should be "governed by any future amendments or additions to those sections which should become effective before the application for the consent decree", but that "the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage".

Also that Chapter 56 impairs the obligation of the contract between the parties and therefore conflicts with Art. 1, Sec. 10 of the Federal Constitution, but is not subject to objection "on the ground that it is special legislation and denies the appellees, the equal protection of the laws, contrary to the 14th Amendment of the Constitution of the United States and to similar provisions of the Constitution and Bill of Rights of Maryland".

We agree that Chapter 56 does not offend the 14th Amendment by denying equal protection of the laws, and accept the reasons given to support that view—"The classification thus made would seem clearly to have direct relation to the purpose which the Legislature had in mind, and which we cannot say was arbitrary or fanciful".

It is well established doctrine that where the contract clause is invoked this Court must determine for itself the nature and effect of the alleged agreement and whether this has been impaired. *Funkhauser* v. *Preston Co.*, 290 U. S. 163. Accordingly we must here decide what agreement resulted from the language employed by the parties to the mortgage.

We cannot sanction the conclusion of the Court of Appeals on this point. The assent set forth in the mortgage was "to the passing of a decree . . . for a sale of the property hereby mortgaged in accordance with Sections 720 to 732 inclusive of Chap. 123 of the laws of Maryland passed at the January session 1898 or any amendments or additions thereto". Prior to the mortgage there had been no such amendment or addition, and it cannot, we think, be correctly said that "the intention of the parties in employing that language embraced only such amendments or additions as had been made prior to the execution of the mortgage". On the contrary, the words employed seem to us sufficient to embrace the amendments and additions thereafter made by Chapter 56. A contrary holding would deprive the words employed of their customary meaning. And we find nothing which requires us to accept any other meaning.

It follows that the challenged Act cannot properly be said to impair the obligation of the agreement between the parties within the meaning of the Federal Constitution.

The judgment under review must be reversed and the cause remanded to the Court of Appeals for further action not in conflict with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.